DONATED
BY

R. N. Vaishnavi
M.A. (PSYCHO.); M.A, (POL. SC.); PUNJAB
L.L B. ALLAHBAD
Advocate
Supreme Court of India
High Court of J & K State
9B, R, C. ROAD, PRATAP PARK.
SRINAGAR (KASHMIR.)

REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

ON

APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.

BARRISTER AT LAW.

VOL. I

1836—1837.

LONDON:

J. AND H. CLARK, LAW [illegible]KSELLERS,
PORTUGAL STREET, LINCOLN [illegible]N;
W. H. ALLAN & CO., LEADENHALL STREET.

REPRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE, MADRAS,
WITH THE PERMISSION OF MESSRS. STEVENS & SONS, LONDON.

DEPARTMENT OF LAW
LIBRARY
UNIVERSITY OF KASHMIR
NO 2417
3.3.201

LIST
OF THE
JUDICIAL COMMITTEE
OF
HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,

ESTABLISHED BY THE 3 & 4 OF WILL. IV. C. 41.

ADVOCATE

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1836—1837.

The Marquis of *Lansdowne,* Lord President.
Lord *Cottenham,* Lord High Chancellor of Great Britain.
The Duke of *Portland,* formerly Lord President.
The Marquis of *Camden,* formerly Lord President.
The Earl of *Harrowby,* formerly Lord President.
The Earl of *Eldon,* formerly Lord High Chancellor of Great Britain.
Lord *Stowell,* formerly Judge of the Admiralty.
Lord *Lyndhurst,* formerly Lord High Chancellor of Great Britain.
Lord *Wynford,* formerly Lord Chief Justice of the Common Pleas.
Lord *Brougham,* late Lord High Chancellor of Great Britain.
Lord *Denman,* Lord Chief Justice of the Court of King's Bench.
Lord *Abinger,* Lord Chief Baron of the Court of Exchequer.
Lord *Langdale,* Master of the Rolls.
Sir *John Nicholl,* Knt., Judge of the Admiralty.
Sir *Nicholas Conynham Tindal,* Knt., Chief Justice of the Court of Common Pleas.
Sir *William Alexander,* Knt., formerly Lord Chief Baron of the Court of Exchequer.
Sir *Lancelot Shadwell,* Knt., Vice-Chancellor of England.

Sir *Robert Graham,* Bart., formerly one of the Barons of the Court of Exchequer.

The Hon. *Thomas Erskine,* Chief Judge of the Court of Bankruptcy.

Sir *William Garrow,* Knt., formerly one of the Barons of the Court of Exchequer.

Sir *James Parke,* Knt., one of the Barons of the Court of Exchequer.

Sir *John B. Bosanquet,* Knt., one of the Judges of the Court of Common Pleas.

Sir *John Bailey,* Bart., late one of the Barons of the Court of Exchequer.

Sir *John Vaughan,* Knt., one of the Judges of the Court of Common Pleas.

Sir *Herbert Jenner,* Knt., Judge of the Prerogative Court.

PRIVY COUNCILLORS, ASSESSORS.

Sir *Edward Hyde East,* Bart., formerly Chief Justice of the Supreme Court at Calcutta.

Sir *Alexander Johnston,* Knt., formerly Chief Justice of the Supreme Court of the Island of Ceylon.

MEMORANDA.

On the 16th of January 1836, Sir *C. C. Pepys,* M.R., Sir *L. Shadwell,* V.C., and Sir *J. B. Bosanquet,* the Lords Commissioners of the Great Seal, having resigned, the Great Seal was delivered by His Majesty to Sir *C. C. Pepys,* who was created a Peer of the United Kingdom, by the title of Baron *Cottenham* of Cottenham, in the county of Cambridge.

On the same day *Henry Bickersteth,* Esq., one of His Majesty's Counsel, was appointed to the office of Master of the Rolls, vacant by the promotion of Sir *C. C. Pepys,* and having been sworn in as a member of His Majesty's Privy Council, was shortly afterwards created a Peer of the United Kingdom, by the title of Baron *Langdale* of Langdale, in the county of Westmoreland.

On the 28th of January 1836, Lord *Stowell* died.

A TABLE OF THE CASES REPORTED IN THIS VOLUME.

A.

PAGE.

Abd-Oollah Hajee Cherak, Edul-jee Fram-jee *v.* 461
Anund Kishwur Sing, Dundial Sing and others *v.* 482

B.

Baboo Mootechund, Moofti Mohummud Ubdoollah *v.* 363
Bengal, Bank of, Young *v.* 87
Bhaee-chund *v.* Purtab-chund 154
Bookun-das Bhoolaki-das, Madho Row Chinto Punt Golay *v.* .. 351
Boman-jee Muncher-jee *v.* Syud Hoossain Abd-Oollah 494

D.

Domun Sing *v.* Kasee Ram 366
Dula-Bhaee Kurparam, Nundram Dyaram *v.* 414
Dundial Sing and others *v.* Anund Kishwur Sing 482

E.

East India Company, Mayor of Lyons *v.* 175
Edul-jee Fram-jee *v.* Abd-Oolla Hajee Cherak 461

F.

Fairlie, Freeman *v.* 305
Fell, Gardiner *v.* 299
Freeman *v.* Fairlie 305

G.

PAGE.

Gardiner *v.* Fell 299
Gholam Russool *v.* Mussumat Mughlo 446

J.

Jannokee Doss *v.* The King 67
Juggurnath Gurg, Motee Lal Opudhiya *v.* 1

K.

Kasee Ram, Domun Sing *v.* 366
Khoorshed-jee Manik-jee *v.* Mehrwan-jee 431
Kirt Chunder Roy *v.* the Government and others 383
Koonwur-jee Manik-jee, Sorab-jee Vacha Ganda *v.* 47

L.

Latchman-das Narrain-das, Mussumat Keemee Baee *v.* 470
Lyons, Mayor of, *v.* East India Company 175

M.

Madho Row Chinto Punt Golay *v.* Bhookun-das Boolaki-das 351
Meer Usd-oollah *v.* Mussumat Beeby Imaman 19
Mehrwan-jee Khoorshed-jee, Khoorshed-jee Manik-jee *v.* 431
Moofti Mohummed Ubdoollah *v.* Baboo Mootechund 363
Motee-chund Manik-jee, Petamber Manik-jee *v.* 420
Motee Lal Opudhiya *v.* Juggurnath Gurg 1
Mussumat Beeby Imaman, Meer Usd-oollah *v.* 19
Mussumat Keemee Baee *v.* Latchman-das Narrain-das 470
Mussumat Mughlo, Gholam Russool *v.* 446

N.

Nundram Dyaram *v.* Dula-Bhaee Kurparam 414

P.

Petamber Manik-jee *v.* Motee-chund Manik-jee 420
Purtab-chund, Bhaee-chund *v.* 154

R.

Ramrutton Mullick, Surroopchunder Chowdry *v.* 358

S.

PAGE.

Sorab-jee Vacha Ganda *v.* Koonwur-jee Manik-jee 47
Surroopchunder Sircar Chowdry *v.* Ramrutton Mullick .. 358
Syud Hoossain Abd-Oollah, Boman-jee Muncher-jee *v.* .. 494

T.

The Government and others, Kirt Chunder Roy *v.* 383
The King, Jannokee Doss *v.* 67

Y.

Young *v.* the Bank of Bengal 87

Order in Council of the 10th of April 1838 ix

R. Vaishnavi
ADVOCATE

ORDER IN COUNCIL

OF THE

10TH APRIL 1838,

Made pursuant to 3 & 4 *Will. IV. c.* 41, *For regulating Appeals from the Supreme and Sudder Dewanny Courts in the East Indies, Prince of Wales Island, Malacca, and Singapore.*

3 & 4 W. IV. c. 41, sec. 24.

WHEREAS, by an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled, "An Act for the better Administration of Justice in His Majesty's Privy Council," it is amongst other things enacted, that "it shall be lawful for his Majesty in Council from time to time to make any such rules and orders as may be thought fit, for the regulating the mode, form, and time of appeal to be made from the decisions of the Courts of Sudder Dewanny Adawlut, or any other Courts of Judicature, in India or elsewhere, to the eastward of the Cape of Good Hope (from the decisions of which an appeal lies to his Majesty in Council), and in like manner from time to time to make such other regulations for the preventing delays in the making or hearing such appeals, and as to the expenses attending the said appeals, and as to the amount or value of property in respect of which any such appeal may be made:" and whereas his said late Majesty did, by his Order in Council, on the 16th day of January 1836, approve certain rules and orders for regulating the mode, form, and time of appeal from the decisions of the said Courts of Sudder Dewanny Adawlut, and also certain regulations for the preventing delays in the making or hearing of such appeals, and as to the expenses attending such appeals; and the said rules, and orders, and regulations were set forth in certain schedules, A. and B., to and by the said Order in Council of the 16th of January annexed and approved : and whereas his said late majesty did, by his further Order in Council made on the 10th day of August 1836, alter and amend the said schedule B., by cancelling the rule No. 5 of the said schedule B. so approved as aforesaid, and ordering that, in lieu of the said fifth rule thereof, a certain other rule in such last-mentioned order set forth should be substituted :* and whereas the Queen's most excellent Majesty in Council hath deemed it expedient to cancel and rescind all the said rules, orders, and regulations, and to make and substitute others in lieu thereof :—

Orders of 16th Jan. and 10th August 1836 rescinded, and rules contained in the annexed schedule enacted in their stead.

Her Majesty is therefore pleased, by and with the advice of her Privy Council, to cancel and rescind all the said rules, orders, and regulations in the said recited Orders in Council of the 16th day of January 1836, and 10th day of August 1836, respectively contained, and thereby or by either of them approved, and to approve of the several rules, orders, and regulations contained in the schedule hereunder written or hereunto annexed, and to order, as it is hereby ordered, that the same be respectively observed by her Majesty's Supreme Courts of Judicature at Fort William in Bengal, Fort St. George, and Bombay respectively, by the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, and by the said several Courts of Sudder Dewanny Adawlut, and all other Courts of Judicature in the territories under the government of the East India Company, and by all persons whom it shall or may concern. Whereof the Governor-General and the Council of India, the Governor of Fort William in Bengal, the Governor in Council at Fort St. George, the Governor in Council at Bombay, the Governor of Agra, the Chief Justice and the Judges of her Majesty's Supreme Court of Judicature at Fort William aforesaid, the Chief Justice and Judges of her Majesty's Supreme Court of Judicature at Fort St. George, the Chief Justice and Judges of her Majesty's Supreme Court of Judicature at Bombay, the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, the Judges of the several Courts of Sudder Dewanny Adawlut in the East Indies, and the Judges of all other Courts of Judicature in the territories under the government of the East India Company, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) C. C. GREVILLE.

THE SCHEDULE ABOVE REFERRED TO.

No appeal to be allowed unless petition presented

1. That from and after the 31st day of December next, no appeal to her Majesty, her heirs and successors in council, shall be allowed

---

* The rules contained in these orders were never acted on.

by any of her Majesty's Supreme Courts of Judicature at Fort William in Bengal, Fort St. George, Bombay, or the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, or by any of the Courts of Sudder Dewanny Adawlut, or by any other Courts of Judicature in the territories under the government of the East India Company, unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree, or decretal order complained of, and unless the value of the matter in dispute in such appeal shall amount to the sum of ten thousand Company's rupees at least; and that, from and after the said 31st day of December next, the limitation of five thousand pounds sterling heretofore existing in respect of appeals from the Presidency of Fort William in Bengal, shall wholly cease and determine.

within six months after the judgment, decree, or decretal order, and the matter in dispute amount to 10,000 rupees.

2. That in all cases in which any of such Courts shall admit an appeal to her Majesty, her heirs and successors in council, it shall specially certify on the proceedings that the value of the matter in dispute in such appeal amounts to the sum of ten thousand Company's rupees or upwards, which certificate shall be deemed conclusive of the fact, and not be liable to be questioned on such appeal by any party to the suit appealed.

Amount certified on the proceedings, to be conclusive.

3. Provided nevertheless, that nothing herein contained shall extend, or be construed to extend, to take away, diminish, or derogate from the undoubted power and authority of her Majesty, her heirs and successors in council, upon the petition at any time of any party aggrieved by any judgment, decree, or decretal order of any of the aforesaid Courts, to admit an appeal therefrom upon such other terms, and upon and subject to such other limitations, restrictions, and regulations as her Majesty, her heirs and successors, shall in any such special case think fit to prescribe.

Power reserved to the Crown to grant leave to appeal notwithstanding the above rules.

4. That on the arrival of the transcripts of proceedings in an appeal to her Majesty, her heirs and successors in council, from any of the said Courts of Sudder Dewanny Adawlut, or any other Courts in the East Indies constituted by the East India Company, or any of their governments from which an appeal lies to her Majesty in council, such officer of the East India Company as the Court of Directors of the said Company shall from time to time appoint, shall forthwith give notice to the clerk of the council thereof, stating at the same time the names of the parties to the appeal, and the date of the decree appealed from, and that such notice shall be duly registered in the council office.

Notice to be given by the Court of Directors of the East India Company to the clerk in Council on the arrival of the transcripts.

The original transcripts to be kept at the India House; the agents on both sides having access thereto, and liberty to take copies, and originals to be produced at the hearing.

5. That the said transcripts of proceedings shall be kept at the East India House, or at such other convenient place within the cities of London or Westminster as the said Court of Directors shall from time to time appoint; the agents respectively conducting and defending such appeals in this country, being at liberty to take all the necessary copies and extracts from the said proceedings, and to examine the same from time to time; and it shall be the duty of such officer, by himself or his sufficient deputy, to produce the original transcripts before the Judicial Committee, upon the hearing of such appeal, upon due notice for that purpose previously given, and upon all other occasions when thereunto required by the Privy Council or the Judicial Committee.

If petition of appeal not lodged within three months, or appellant's case within one year, the respondent may move to dismiss for want of prosecution: if respondent's case not brought in within one year, appellant may move to hear *ex parte*.

6. That in default of the petition of appeal of the appellants being lodged in the council office within three calendar months from the registration of the arrival of such transcripts, or in default of the appellant's case being carried in within one year from the time of such registration, the respondent shall be entitled in either case to move to dismiss the appeal for want of prosecution; and in the event of the respondent's not bringing in his case within one year from the time of such registration, the appellant shall be entitle to apply to have the case heard *ex parte*.

(Signed) C. C. GREVILLE.

REPORTS OF CASES

HEARD AND DETERMINED

BY THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME AND PROVINCIAL COURTS IN THE EAST INDIES.

MOTEE LAL OPUDHIYA .. .. .. *Appellant*,

v.

JUGGURNATH GURG, Heir of MUSSUMAT MUNTRA .. .. .. *Respondent*.*

On Appeal from the Court of Sudder Dewanny Adawlut of Bengal.

*Deed—Setting aside—*Razenamah *alleged to have been obtained by duress and fraud—Burden of proof—Nature and quantum of evidence required—Sentence of Criminal Court—Sufficiency of.*

The Court of Sudder Dewanny Adawlut having refused to set aside a deed of *razenamah* for compromising an appeal then pending from that Court to the King in Council, alleged to have been obtained by fraud and duress: held on appeal by the Judicial Committee that the *onus* of proving such fraud and duress lay upon the appellant in proceeding upon his petition in the Court below, and their Lordships being satisfied that full opportunity for such proof had been afforded him, confirmed the judgment of the Sudder Court, but, under the circumstances, without costs.

THIS was an appeal from an order of the Sudder Dewanny Adawlut, dated 12th *April* 1815, whereby the Court dismissed a petition of the appellant, praying 26 November 1836.

---

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Right Hon. T. Erskine, Chief Judge of the Court of Bankruptcy, and Sir Alexander Johnson.

that a certain appeal might be revived, which he had preferred to His Majesty in Council from a decree of the same Court in a suit between the above-named parties.

The suit in which the appellant preferred his principal appeal from the decree of the Sudder Dewanny Adawlut, and for the revival of which appeal he presented the aforesaid petition to that Court, was instituted by the present appellant as a pauper plaintiff in the year 1805, in the Zillah Court of *Midnapore*, whereby, upon the alleged title as adopted son and heir of *Raja Anund Lal Opudhiya*, deceased, and *Rany Jankee*, his wife, he claimed to be entitled to the zemindary of the pergunnas of *Mysadil*, *Goomgur*, and others, the yearly profit of which amounted to 1,07,950 rupees. This zemindary the appellant sought to recover from *Mussumat Muntra*, the defendant in the suit in the Zillah Court, who was in possession, and claimed under the will of her son, *Gooroo Persad Gurg*, deceased, whose title to the zemindary was derived under a deed of gift executed in his favour by *Rany Jankee*, upon whom the whole zemindary had devolved on the predecease of her husband, *Raja Anund Lal Opudhiya*, without issue.

It appeared from the proceedings in the suit in the Zillah Court, that the appellant had in the lifetime of the *Rany* commenced a suit against her in the same Court, in which he claimed an allowance for maintenance as the adopted son of the *Rany*. This suit, however, terminated by the appellant disclaiming all right to such allowance. The disclaimer was made by deed, which was entered among the proceedings in the suit, after the *Rany* had put in her answer to the plaint, by which she denied that she had ever adopted

1836.

MOTEE LAL OPUDHIYA *v.* JUGGURNATH GURG.

the present appellant as her son, and stated that merely on account of his poverty and his being an orphan, she had brought him up in the same manner as other Brahmin's children.

By the deed which the appellant then entered and delivered in Court on the 18th *April* 1800, he declared to this effect : "that I, the plaintiff, have no claim for subsistence on the said *Rany.*" The denial contained in the *Rany's* answer to the appellant's plaint in the above-mentioned suit, of any right subsisting in him even to an allowance for maintenance out of the zemindary, and the express disclaimer on his part of any such right, were insisted on by the respondent as negativing the appellant's claim to the character of adopted son of the *Rany.*

The appellant, on the other hand, insisted that upon the death of *Raja Anund Lal,* in the year A.D. 1765-6, when the appellant was about three years old, his adoption was confirmed by *Rany Jankee,* the late *Raja's* widow, who, on the appellant's arrival at years of discretion, resigned to him the management of the zemindary, of which she had obtained a grant from the government in her own name. The appellant however, having had the misfortune to lose his eyesight, and thereby become incapacitated for business, the *Rany* re-assumed the management of the zemindary until her death in 1805. He insisted also that the deed of gift under which the defendant claimed was a forgery.

Witnesses were examined on both sides, and the Zillah Court, after a laborious inquiry into the facts of the case, by a decree dated 10th *July* 1805, declared the appellant's claim to be fully established on the oral evidence, without reference to the documentary proof, and directed that he should be put into posses-

1836. MOTEE LAL OPUDHIYA v. JUGGURNATH GURG.

sion of the zemindary, and that *Kurnaee Das* (the manager of the estate, and one of the defendants) should pay the appellant 1,07,950 rupees, 9 anas, and 18 cowries, as one year's profit, with all costs of suit.

From this decree the defendants appealed to the Provincial Court of *Calcutta.* That Court, without any *viva voce* examination, either of the former or of new witnesses, but on comparison of the depositions of the witnesses examined on either side in the Court below, with the documentary evidence there taken and transmitted to the Provincial Court, reversed the decree appealed from, ordered the appellant to pay to the defendant *Mussumat Muntra* 1,07,950 rupees for rents and profits accrued during the year he held possession of the zemindary, together with all costs of suit, both in the Zillah and Provincial Courts.

The appellant appealed from this decree to the Sudder Dewanny Adawlut at *Calcutta.* Before, however, his appeal was heard, *Mussumat Muntra* died, and the present respondent, *Juggurnath Gurg,* her step-son and heir, was, on petition to the Court, admitted as a party in her stead. By a decree dated 20th *November* 1807, the Sudder Dewanny Adawlut affirmed the decree of the Provincial Court, and directed the costs of both parties to be paid by the appellant.

The present appellant then presented his petition to the Sudder Dewanny Adawlut, praying that he might be at liberty to appeal to His Majesty in Council, the prayer of which petition was granted; and the appellant having given the requisite security for costs, the appeal was, on the 28th *December* 1807, admitted.

On the 7th *September* 1808, the appellant, being incumbered with debt, and apprehensive of personal arrest if he should venture within the limits of the jurisdiction of the Supreme Court, within which the Sudder Dewanny Adawlut is held, appeared personally before Mr. *Ravenscroft,* the Judge of the Zillah Court of the Twenty-four Pergunnas, adjoining to *Calcutta,* and presented a *razenamah** and petition; by the former of which it was stated by the appellant, that by the advice of several persons, who at the time were his companions, and had charge of his affairs, and had obtained from him on an unfounded statement of expenses several judgment-bonds, he had appealed the suit to England; but that the decrees of the Provincial and Sudder Courts having been given after full examination and consideration, he had no hope that his adoption would be established in *England,* or the decrees of those Courts reversed, or that any thing besides trouble and vexation would occur. The *razenamah* then proceeded thus : "I therefore, being of sound and disposing mind, do, of my own free-will and desire, withdraw my appeal from *England*; and from and after this time, neither I nor my heirs shall have any claim, on the ground of my having been adopted by *Raja Anund Lal and Rany Jankee,* upon the estate or effects of the said *Rany.*" The appellant's petition to the Zillah Court of the Twenty-four Pergunnas, under which the *razenamah* was presented, stated that he, the appellant, withdrew his appeal to *England*; and he assigned as the reason for not presenting his *razenamah* and petition to the Sudder Dewanny Adawlut, that since several of his (the appellant's) creditors, holders of the said judgment-bonds, were desirous of obtaining an order for his confinement from the Supreme Court, he could not present this deed of agreement in person in the Court of Sudder Dewanny; but that since the

---

* Deed of compromise and release.

1836.

MOTEE LAL OPUDHIYA *v.* JUGGURNATH GURG.

records of all Courts were alike, he delivered into that (the Zillah) Court of the Twenty-four Pergunnas (which had no jurisdiction over the property in question, and where no proceeding connected with it had been previously instituted,) his petition and deed of agreement, the contents whereof he knew and consented to, and hoped that his petition and deed of agreement would be forwarded to the Court of Sudder Dewanny, that on the receipt thereof his appeal to *England* might be revoked.

Upon the presentation of the above-mentioned *razenamah* and petition, the appellant was interrogated in open Court before the Judge, as to the deed of agreement having been entered into by him of his own freewill and desire, and also as to the cause of its not being presented to the Court of Sudder Dewanny; and the appellant having given satisfactory answers to these inquiries, the deed of agreement was sealed with the appellant's seal in the presence of *Gholam Mustafa*, a vakeel of the Zillah Court of the Twenty-four Pergunnas, who was then in attendance, and the certificate of Mr. *Ravenscroft,* the Zillah Judge, that the deed was acknowledged before him by the appellant, was annexed. And it was thereupon ordered by the Zillah Court that the original petition of the appellant, together with the deed of agreement and the proceedings of the Zillah Court held thereon, should be forwarded to the Court of Sudder Dewanny.

Although no consideration moving from the respondent was stated on the face of the appellant's *razenamah,* yet it appeared in the proceedings afterwards held before the Sudder Dewanny Adawlut relative to the revival of the appeal, that this agreement was not *nudum pactum,* but that the respondent paid to or for the use

1836.

MOTEE LAL OPUDHIYA v. JUGGURNATH GURG.

of the appellant, in consideration thereof, the sum of 50,800 rupees.

ADVOCATE

After the receipt by the Sudder Dewanny Adawlut of the appellant's petition and *razenamah*, and of the proceedings of the Zillah Court of the Twenty-four Pergunnas held thereon, *Raja Gopal Inder Narain*,—who, upon the appeal from the Zillah Court's decree to the Provincial Court being admitted, and upon the present appellant's being let into possession under that decree, had become his surety for abiding by the decree of the Provincial Court on the appeal, and had, in discharge of his liability, paid 1,07,000 rupees into the Zillah Court, in performance of the decree of reversal of the Provincial Court,—presented a petition to the Sudder Dewanny Adawlut, praying either that the appellant's *razenamah*, by which he had withdrawn his appeal to *England*, might be rejected, or that some method might be adopted whereby the petitioner might be relieved, and recover the money which he had paid in execution of the Provincial Court's decree.

On the 9th *September* 1808, the Sudder Dewanny Adawlut took into consideration the *razenamah* and the matters connected with it, and also the before-mentioned petition of *Gopal Inder Narain*; and on that petition being read, the attorneys of the appellant, who were present, and who were questioned by the Court, observed that their client, of his own accord, being present in the Court of the Twenty-four Pergunnas, had delivered in the *razenamah*, and had no objection to offer in the affair. Whereupon the Sudder Dewanny Adawlut ordered that the *razenamah* should be accepted, and that the translation of the papers, and the transmission of them to *England*, should be put a stop to; and the Court gave certain directions for discharging

1836.
MOTEE LAL OPUDHIYA *v.* JUGGUR-NATH GURG.

the securities given by the present respondent, and the security-bond entered into by the present appellant's surety was ordered to be returned.

On the 24th *June* 1809, being nearly *ten months* after the appellant had appeared in the Zillah Court of the Twenty-four Pergunnas, and had presented his petition and *razenamah,* he applied by petition to the Sudder Dewanny Adawlut that his appeal might be revived, and the papers translated and transmitted to *England*; alleging as a reason for this application to set aside his *razenamah,* that it had been extorted from him by menaces and duress. The statements contained in his petition, wherein he set forth the circumstances under which he withdrew his principal appeal in the suit, were to the following effect :

" That owing to his blindness, and the various disadvantages to which he was thereby subjected, the proceedings in this complicated and protracted suit had been chiefly conducted by his *dewan** (*Grudhur Kur*), and his *mokhtar*† (*Bholonath Sen*) : that the present respondent and *Ram Koomar Birm,* one of the defendants in the original cause, the contriver of the plot, being apprehensive that upon the appeal to *England* a decree of the estate would be given in favour of the appellant, seduced, by means of large bribes, *Grudhur Kur,* and *Bholonath Sen,* and other servants of the appellant, who were present in *Calcutta* for the management and communication of the affairs under suit; on which the said *Grudhur,* coming to the appellant at *Moorshedabad,* stated orally, as if from the respondent, that the estate of *Mysadil* was the appellant's by right : that he, the respondent, through the seduction of ill-meaning persons, having claimed it, prevailed by contending that he was heir to it, and thus obtained a decree in his favour: that he now only asked of the appellant an allowance to live upon, and the appellant might enter upon and possess the estate, which belonged to him: that by this falsehood the said *Grudhur* drew the appellant and his family from *Moorshedabad to Bydabantee,* in which place, having lodged his family, he kept the appellant for nearly a month prisoner in a vessel called a *budgerow.* At last, in breach of the promise he had made at *Moorshedabad,* he threatened that if the appellant did not withdraw his appeal to *England,* and give in a deed of agreement, he would put the appellant to death; and that *Ram Koomar* and others, joining in the threat, determined to take away the life of the appellant, who, as he alleged then, thought that his faithless servants had all been seduced by the respondent, and that there was therefore no remedy but to comply with what was required. With the determination, then, that having afterwards informed the Judges of the Sudder of the circumstances he should obtain redress, he answered to these, his mortal enemies, that they should carry him before the Judges of the said Court, where he would deliver his deed of retraction. That accordingly, having removed him thence, they stated that the Zillah Court of the Twenty-four Pergunnas was at hand, and the records of all Courts alike, and that he should enter the deed of relinquishment in that Court, otherwise that they would immediately put him to death: that having said this, they sealed with the appellant's seal, which was in possession of *Bholonath Sen,* some papers which they had probably drawn up previously to suit their purpose, and presented them, and stated to the appellant that they had sealed a petition and deed of retraction with the appellant's seal, and pre-

---

* Chief revenue servant.

† Agent.

1836.

MOTEE LAL OPUDHIYA *v.* JUGGURNATH GURG.

sented them. At that time the appellant, as he alleged, supposing that if that place were indeed a Zillah Court his enemies could never have said with such assurance, that if he would not deliver a deed of relinquishment they would kill him, he saw no remedy but patience and silence : that after that, ten or twelve officers (*peadahs*) carried him thence in custody to *Persadnugur,* which is close to the house of *Ram Koomar,* and there kept him some days in a state of imprisonment : afterwards, having taken him to *Mysadil,* they kept him in close custody of several keepers; but that the name of *Ram Koomar* aforesaid having been entered for three anas in sixteen (18¾ per cent.) of the said estate, he had been less watchful in the custody of the appellant, who, deeming the opportunity a boon, came under the guidance of a single person to *Calcutta.*"

The respondent, upon being called upon by the Court of Sudder Dewanny to give an answer to the statements contained in the foregoing petition, endeavoured to expose the extravagance and improbability of the appellant's story, and declared that it was entirely devoid of truth, wholly untenable, and inconsistent with reason : that both prior and subsequent to the filing of the *razenamah* the appellant was attended by about fifty or sixty *burgundasses** and other servants, which was still the case; and the respondent observed, that if the appellant had really entertained those apprehensions in regard to his personal safety which he had stated in his petition, what could have been his reason for omitting to send information of them, through the servants attached to him, to his vakeels and other friends in *Calcutta,* such as *Gopal Inder Narain,* his bail for enforcing the Zillah Decree,

* Men armed with matchlocks.

1836.
MOTEE LAL
OPUDHIYA
v.
JUGGUR-
NATH
GURG.

to *Kalechurn Kuldar,* his security for expenses in appeal to the King in Council, and to *Baboo Gopee Mohun Thakoor,* his patron and protector, who were all persons of great respectability? for by their interference he might have avoided all those fears. The respondent also stated, that after the admission of the *razenamah* the appellant went to *Persadnugur* from a dread of his creditors, and took a house adjoining to the police; that he proceeded from that place to *Mysadil,* erected a new house at *Bausdoopore,* and engaged in commercial speculations : and that the real truth was, that after he had withdrawn his appeal from a consideration of its hopelessness, he had been persuaded by *Gopal Inder Narain* and several opulent persons in *Calcutta* to renew it by his recent petition : and the respondent insisted, that after the execution by the appellant of the *razenamah,* and filing it in a Court of Justice, and its admission by that Court, he could not be permitted to render that instrument null and void *ten* months subsequent to those events. That the regulations established by the Government, the uniform practice of the Courts, and every species of justice, militated against such an idea.

On the 4th *August* 1809 the Sudder Dewanny Adawlut interrogated the appellant personally in relation to the particulars set forth in his petition. Although his answers corresponded with those particulars, the Court, consisting of *John Herbert Harington* and *James Stuart,* Esquires, were of opinion that there was no reason to suspect that the appellant had not filed the *razenamah* with his own free-will and consent, and that the assertion of the appellant, that he was confined and compelled by menaces to file it, brought forward after a lapse of ten months, did not appear to be entitled to credit : his petition was therefore deemed inadmissible by the Court.

The appellant thus finding himself without remedy in the Sudder Dewanny Adawlut, preferred an indictment in the Supreme Court of *Calcutta* against *Greedhur Kur, Ram Koomar Birm, Bholonath Sen,* and *Hurry Deb Roy,* for an assault and false imprisonment, and compelling him to execute the *razenamah* in question.

This indictment, which was so framed as to include only the imprisonment of twenty-two days suffered within the jurisdiction of the Supreme Court, came on for trial on the 14th *December* 1810. The trial lasted five days, and on the 19th *December* 1810 the jury found all the defendants guilty. The judgment thereupon was signed on the 22nd *December*. *Greedhur Kur* was sentenced to two years and a half imprisonment in the common jail of *Calcutta,* during that time to be once placed in the pillory, to pay a fine of 5,000 rupees to the king, and to give security for his good behaviour for five years, himself in 5,000 and two securities in 2,500 rupees each. *Ram Koomar Birm* and *Hurry Deb Roy* were sentenced to two years imprisonment, to be once placed in the pillory, to pay fines to the king of 5,000 rupees each, and to give security for their good behaviour for five years, themselves in 5,000 rupees each, and two sureties for each in 2,500 rupees each. *Bholonath Sen* was sentenced to three years imprisonment, to be once placed in the pillory, to pay a fine of one rupee to the king, and to give security for his good behaviour, himself in 2,000 rupees, and two sureties in 1,000 rupees each.

The defendants appealed from this judgment of the Supreme Court to His Majesty in Council; but upon the hearing of the appeal, His Royal Highness the

Prince Regent, acting for and on behalf of His Majesty, on the 11th *June* 1812, affirmed the said judgment.

Relying upon this judgment, the appellant subsequently brought an action of ejectment against the respondent in the Supreme Court, for three houses situate within its jurisdiction, claimed by him under the same title with the zemindary which is the subject of the present suit. The Supreme Court, after going at great length into the merits of the case, gave judgment in favour of the appellant on the 17th *March* 1812. To this judgment the respondent submitted, never having appealed therefrom.

The title to the property which was the subject of the decree of the Sudder Dewanny Adawlut sought to be appealed against, and the title to the property which was the subject of the above ejectment suit in the Supreme Court, were admitted by the respondent to be one and the same.

After having obtained the foregoing verdict and judgment, the appellant, on the 21st *August* 1812, presented two petitions to the Sudder Dewanny Adawlut, one of which prayed for a re-hearing of his case, and the other, which was founded on the verdict given on the indictment, prayed for the revival of his appeal from the Sudder decree. Upon the former of these two petitions the Court, on the 16th *December* 1814, ordered that the appellant's prayer for a review be rejected. With reference to the other petition, it was thought expedient by the Court, in order to ascertain the truth of the appellant's statement of what took place in the Zillah Court of the Twenty-four Pergunnas, that the evidence of Mr. *Ravenscroft* should be taken; and on the 26th *February* 1813 an order was passed for that purpose. That gentleman was accordingly

1836.

MOTEE LAL OPUDHIYA *v.* JUGGURNATH GURG.

examined in Court, upon oath, in the presence of both parties, on the 4th *March* 1813. From his examination it appeared, that in the proceedings of the Zillah Court of the Twenty-four Pergunnas, the appellant was in fact asked whether he entered the *razenamah* of his own free-will and consent, and his motive for presenting it in that Court instead of the Court of Sudder Dewanny, by one of the officers of the Court: that Mr. *Ravenscroft*, observing that the appellant was blind, took the appellant's evidence with very particular care, and that what the appellant said was exactly taken down: that whilst the proceedings were going on, the witness (Mr. *Ravenscroft*) was sitting in open Court, and the officers of the Court, the *vakeels*, and people, were in public attendance at the time, and that the appellant *did not exhibit any symptoms of fear or apprehension.*

After considering this evidence and the whole state of the cause, the Sudder Adawlut, on 9th *November* 1814, determined that the sentence of the Supreme Court in a criminal case could not in any way be admitted as evidence in a civil case in their Court, and required the appellant's *vakeels* to produce evidence in support of the allegation in the petitions touching the execution of the *razenamah*. Before any evidence was produced, the Sudder Adawlut, by an order dated 16th *December* 1814, declared the prayer of the petition for a review to be inadmissible.

At a subsequent date (viz. in *January* 1815) the appellant produced witnesses before the Third Judge of the Sudder Adawlut to prove duress subsequent to the delivery of the *razenamah*.

The respondent produced evidence to contradict this, and to prove that the appellant, notwithstanding his rank and blindness, has actually carried on at *Kalkacoond* an active and diversified trade. No additional evidence was adduced, either to confirm or disprove the imprisonment of the appellant previously to the delivery of the *razenamah* or of the circumstances which occurred on that occasion. The notes of the Judge of the Supreme Court on the trial, and the evidence of Mr. *Ravenscroft,* were considered, both by the Court and parties, as sufficient upon those points.

On the 12th *April* 1815 the Court of Sudder Adawlut declared that the appellant's statement regarding the *razenamah* of the 7th *September* 1808, by which he relinquished the appeal of his case, had been by no means established, and that there was no necessity for reversing the orders passed by that Court on the 9th *September* 1808 and the 4th *August* 1809, and therefore ordered that the prayer of the appellant for the revival of his appeal to England should be rejected, but that an appeal from that their final order should be admitted, on his filing a petition for it and giving security for costs, in which case copies of all the papers and proceedings in the principal suit itself, and the decisions of the Zillah and Provincial Courts, and the decree of that Court given on the 20th *November* 1807, should be prepared for transmission to the King in Council at the appellant's expense.

The appellant having complied with the conditions of the order of the 12th *April,* 1815, an appeal from the judgment contained therein was admitted by the Sudder Adawlut, and the appellant submitted that the same ought to be reversed, and that he ought to be permitted to appeal from the decree of the 20th *November* 1807, for the following reasons :—

I. Because the evidence adduced in the Court below,

1836.

MOTEE LAL OPUDHIYA *v.* JUGGURNATH GURG.

and especially when taken in conjunction with the civil and criminal proceedings in the Supreme Court, (the civil part of which proceedings were on the present occasion admitted by the respondent, and the criminal part having been since confirmed by the Privy Council on appeal,) satisfactorily proved that direct force and fraud were employed by the respondent in obtaining and perfecting the *razenamah,* which ought, on that account, to be pronounced invalid.

II. Because, even if direct fraud or duress should not be deemed sufficiently established, yet the whole evidence relating to the *razenamah* raised such strong presumption of unfair dealing on the part of the respondent, and doubt about what actually took place in the Court of the Twenty-four Pergunnas, on an occasion where the helplessness of the party and large amount of the property called for peculiar vigilance, that the judgment complained of ought in equity to be set aside, both upon general grounds and the special circumstances of the case.

The respondent, on the other hand, submitted that the order of the 12th *April* 1815 ought to be affirmed, and the appeal thereupon dismissed, for the following reason :—

Because, from the whole evidence adduced and laid before the Sudder Dewanny Adawlut with regard to the *razenamah* in question, even if the proceedings in the Supreme Court were admissible, no other conclusion could justly be formed than that it was the result of a fair compromise between the parties, freely and voluntarily executed by the appellant; and that if any consideration for the abandonment of a vexatious claim were necessary, it was founded upon a good and valuable consideration moving from the respondent and accepted by the appellant.

1836.

MOTEE LAL OPUDHIYA *v.* JUGGURNATH GURG.

Mr. *Miller,* K.C., and Mr. *Wigram,* K.C., for the appellant, cited *Barnsley* v. *Powel,* (1 Ves., Sen., 287.) *Duff* v. *Fife,* (1 *Shaw,* House of Lords Reports,) *Sheikh Dahoo* v. *Collector of Parma,* (4 Mc. Naugh. 80.)

Mr. Serjeant *Spankie* and Mr. *E. J. Lloyd,* for the respondent, were not called upon by the Court.

Lord BROUGHAM :

We are of opinion, in the first place, that the *onus* of proof lies clearly upon the appellant—the affirmative of the question, Was or not this *razenamah* obtained by duress? And though fraud also is mixed up in this question of duress, it is principally a question of duress, whether or not there was a conspiracy by these persons to obtain from him this release : and we are of opinion (as indeed there is no occasion to argue that point) that the *onus* lies upon the appellant to satisfy the Court here, as it lay upon him to satisfy the Court below, that there was such a case of duress or fraud by which the *razenamah* was obtained. It is not sufficient to say that it is a case of doubt; that it is not perfectly clear, that the appellant was a free agent; that there may be suspicions on the conduct of the other party; or that there is a possibility and that there may be ground for the conclusion that it was not his own act. That is not sufficient : mere possibility, or, even to go further, probability, that there may have been such an origin of the transaction, is not sufficient to entitle the Court to set aside this *razenamah.* We are of opinion, that there is not sufficient to satisfy us, and that the evidence ought not to have satisfied the Court below, that such duress or fraud was resorted to in obtaining the *razenamah*; and, consequently, we think that the right conclusion has been come to.

1836.

MOTEE LAL OPUDHIYA *v.* JUGGURNATH GURG.

The other point that has been taken is, that the question before the Court below, and brought by appeal before us, is, whether or not there was ground for further inquiry, and that the Court below did not give an opportunity to the parties to adduce all the evidence they were in possession of. Here again we are of opinion, that the proof lies upon the appellant, and that, complaining as he now does that he had not an opportunity of giving his evidence to the Court below, it is for him to show from these proceedings that he was ready to produce evidence, and offered that evidence, and that the Court rejected it. On the contrary, taking the statement which we have of what took place below principally from that on which both parties most rely, as well as upon the more formal and distinct account of those proceedings, namely, the statement of Mr. *Stuart,* the third Judge's Judgment, it rather appears that a certain mode of inquiry was pointed out; that a particular mode of taking the evidence was suggested; and that there was, I will not say acquiescence of the parties in that mode, (for it is not necessary in that case,) but there was no objection by the parties; and that there was no evidence tendered by them which the Court refused to hear : consequently, we are of opinion, that upon that ground also the appellant has failed; that he has not satisfied us that he tendered evidence, which was rejected; and that upon the whole of the trial the question was substantially gone into : the only evidence which he did adduce having been examined by the Court, and he having had the benefit of that examination. Under the circumstances, however, of the case, while we affirm the order of the Court below upon the grounds I have stated, we do not think that costs ought to be given.

MEER USD-OOLLAH, also called SHAH CHAMAN . . . . . . *Appellant*,

v.

MUSSUMAT BEEBY IMAMAN, Widow of SHAH KHADIM HOOSSAIN . . *Respondent.**

On Appeal from the Court of Sudder Dewanny Adawlut of Bengal.

Adverse possession—Burden of proof—Defendant's possession if on behalf of plaintiff—Title—Proof of—Entry in public record—Registration of Title—Secondary evidence—Admissibility.

Though the registers made pursuant to the Bengal Regulations are not at all of the nature of conclusive evidence of title (the Regulations themselves providing against that), yet as the act of registration after a proclamation amounts to a public, open, and notorious assertion of title on the one side, the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, afford equally strong presumption of the non-existence of any title on the other.

When, therefore, a party sought to obtain possession of certain property denominated a *muddud-mash*, against a defendant whose adverse possession had existed from 1761, upon the allegation that such adverse possession was in the character of agent to the plaintiff, the Judicial Committee held (affirming the judgment of the Court below) that the proof of such agency lay on the plaintiff; and the balance of evidence being in favour of the defendant's right to possession, the circumstance of his having registered himself as owner in 1797, without any opposition, or subsequent claim to register on the part of the plaintiff, and having continued in undisturbed possession from that period, was conclusive against the claim set up by the plaintiff. *Semble* copies of documents, for the originals of which no proof was given of search, cannot be received as secondary evidence.

28 and 30 Nov. 1836.

ON the 14th day of *September* 1813, the present appellant instituted this suit in the Provincial Court for the division of *Patna* against the respondent, for the recovery of an extensive estate, consisting of several entire villages, and of houses and lands, situate in the two zillahs *Benares* and *Tirhoot*, and in the city of *Patna*, the yearly produce or value whereof was represented as amounting to rupees 12,706, exclusive of the value of dwellings, stated to be worth rupees 1,500.

---

* Present Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Bankruptcy Court, Sir Hyde East, and Sir Alexander Johnston.

1836.

MEER USDOOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

Some portions of the estate, the particulars of which were specified in a schedule to his plaint, were not in the posession of the Respondent, but had been alienated many years before by persons through whom the respondent derived title. With these exceptions the respondent was in possession of the whole, and claimed to be entitled thereto as owner, by a title adverse to that set up by the appellant.

The greater part of the villages and lands in question had been derived under *badshahee,* or royal grants made long prior to the 12th of *August* 1765, the date of the *East-India* Company's accession to the Dewanny. The earliest grant which in the course of the proceedings in the Provincial Court was adduced in evidence was dated as far back as the year 1604 A.D. The villages and lands respectively comprised in these grants were granted either as "*ayeema,*" which signifies an allowance to pious or learned persons of the *Mahomedan* religion, or as "*muddud-mash,*" or aids for subsistence, and the majority of the grants had been made to descendants of *Syud Mahomed Peer Dumreah,* and to their retainers and dependants, for maintenance, and for the support of the tomb of *Mahomed Peer Dumreah,* a Mahomedan saint, in or near the city of *Patna,* and of a religious establishment connected therewith, of which the descendants of *Peer Dumreah* were the heads, under the title of "*Sijjada-nashin.*"

The nature of the property in dispute is specified and described by Regulation XXXVII, of the *Bengal* Government, A.D. 1793, entitled "A Regulation for re-enacting, with modifications, the Rules passed on the 23rd *April* 1788, and subsequent dates, for trying the validity of titles of persons holding or claiming a right to hold *Altumgah, Jaghire,* and other lands exempt from the payment of public revenue, under grants termed *badshahee,* or royal grants, and for determining when certain grants of that description shall be considered to have expired; and for fixing the amount of the public revenue to be assessed upon the lands, the grants for which may expire, or be judged invalid, passed on,'' &c.

By section ii, it is enacted, '' that *altumgah, jaghire, ayma, muddud-mash,* or other *badshahee* grants for holding land exempt from the payment of revenue, made previous to the 12th August 1765 (the date of the Company's accession to the Dewanny), shall be deemed valid, provided the grantee actually and *bona fide* obtained possession of the land so granted previous to that date, and the grant shall not have been subsequently resumed by the officers or orders of the Government.''

By section xv, '' *Altumgah, ayma,* and *muddud-mash,* grants are to be considered as hereditary tenures. These and other grants, which from the terms or nature of them may be hereditary, and are declared valid by this Regulation, or which have been or may be confirmed by the British Government, or any of its officers possessing competent authority to confirm them, are declared transferrable by gift, sale, or otherwise; and all persons succeeding to such grants, by whatever mode, are required to register their names in the office of the collector, within six months after they may succeed to the grant. But all such purchases are to be considered as made at the risk of the purchaser; and in the event of the grant not proving hereditary, or not to have been made or confirmed by the British Government, or its officers possessing competent authority, the transfer is not to preclude the land from being subjected to the payment of revenue under this Regulation. *Jaghires* are to be considered as life tenures only, and with all other life tenures, are to expire with the life of the grantee, unless otherwise expressed in the grant."

By sections xvii, xviii, xix, xx, xxi, and xxii, the manner of preparing the register, and requiring parties to enter their grants is provided, and by section xxiii it is expressly declared, "that the registry of a grant under that Regulation is not to be considered as an admission of the right of the person in whose name it may be registered, to the property in the soil, nor of the validity of his grant : any person being at liberty to sue in the Dewanny Adawlut for the former, and being liable to be sued for the redemption of the grant by the collector, with the sanction of the Board of Revenue, in the event of it appearing to that Board that the grant was invalid."

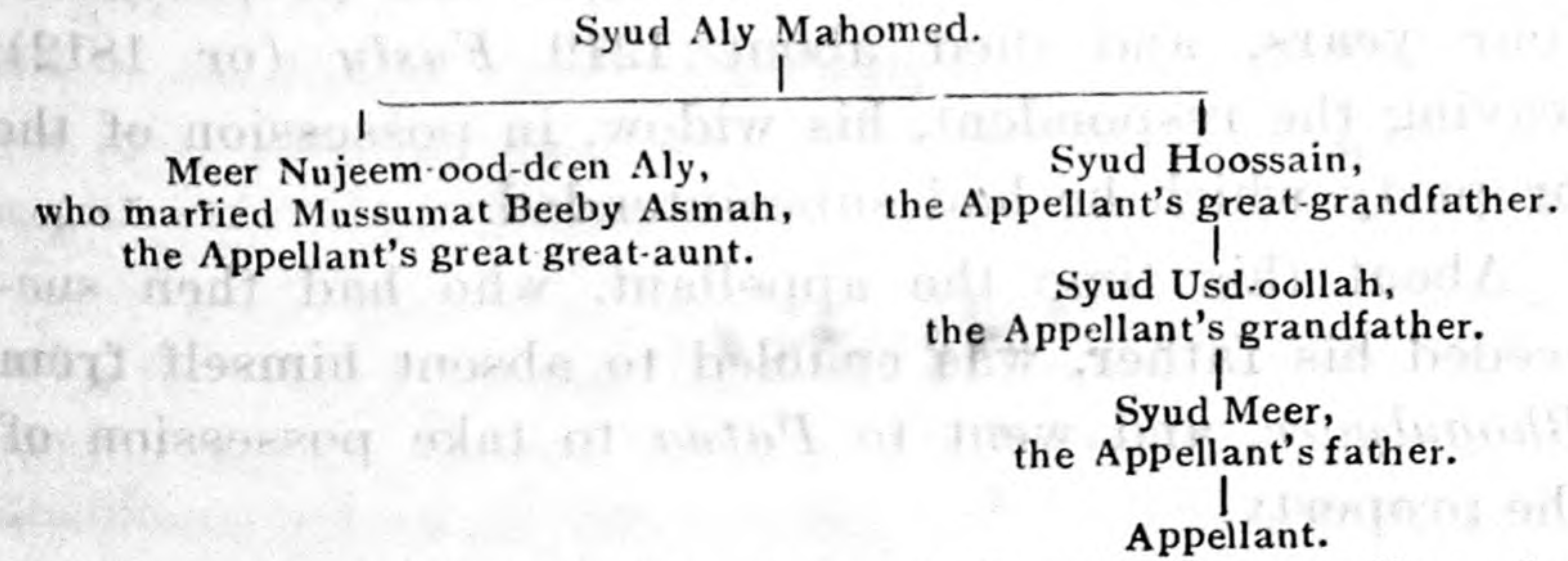
On the part of the appellant it was contended that the word "land," as used in the above-mentioned Regulation and others, when applied to the subject of a *badshahee* or royal grant, was not confined to the soil only, but included the Government share of the produce, and was in fact the land revenue of the state. This, however, and some other minor points as to the identity of the lands in question, was disputed by the Respondent, upon which no decision was come to in the Court below.

The entire property, which was the subject of the suit was originally vested in *Meer Nujeem-ood-deen Aly,* from whom both the appellant and respondent derived title, and who was *Sijjada-nashin,* one hundred and twenty-six years before the institution of the suit, and in virtue of the settlement made upon his marriage with *Mussumat Asmah* (the appellant's great-great-aunt), she became absolute owner of the property upon his death. *Mussumat Asmah* appointed her father, *Syud Aly Mahomed,* and her own brother *Syud Hoossain,* otherwise *Syud Meer,* managers of the property, and in the reigns of *Ferokseer* and *Mahomed* renewed grants of some of the villages were made out in their names.

Mussumat Asmah afterwards transferrd the whole of the property to *Hoossain's* son, named *Syud Usd-oollah,* the appellant's grandfather, and appointed him *Sijjadanashin,* or religious superior, at the threshold or shrine of *Syud Mahomed Peer Dumreah,* in the city of *Patna.*

The appellant made out his title to the property by inheritance from his grandfather, the above-named *Syud Usd-oollah,* to whom the property was so conveyed.

The following statement of the relationship of the material parties, was alleged and proved by the appellant. The accuracy of this statement, and the possession of the entire property by *Meer Nujeem-ood-deen Aly,* and the legal capacity of *Mussumat Asmah* to alienate the property, were denied by the respondent.


Syud Aly Mahomed.
Meer Nujeem-ood-deen Aly,
who married Mussumat Beeby Asmah,
the Appellant's great great-aunt.
Syud Hoossain,
the Appellant's great-grandfather.
Syud Usd-oollah,
the Appellant's grandfather.
Syud Meer,
the Appellant's father.
Appellant.

Syud Usd-oolah being invested with an office for religious instruction and initiation at *Bhogulpore,* which required his presence at that place, was prevented from residing at *Patna*. The same reason continuing to operate upon the succeeding owners of the property, Bhogulpore remained the family residence of the appellant and his ancestors, and the property at *Patna* was placed in the hands of agents or deputies.

The first agent or deputy appointed to manage the property after it came into the possession of *Syud Usd-oollah* was *Syud Moozuffer,* his cousin-german, and on the death of *Syud Moozuffer, Syud Usd-oolah* deputed *Meer Gholam Hoossain* to fill the same office.

On the death of *Syud Usd-oollah, Syud Meer,* the appellant's father, succeeded to the estates, and on the death of the deputy, *Meer Gholam Hoossain,* he nominated *Meer Gholam Kullundar,* his own brother-in-law, as his deputy.

Meer Gholam Kullundar died in 1761, and upon his death *Beeby Zenut* petitioned the appellant's father to appoint her the agent or deputy. This, in consideration of his relationship to her, he accordingly did.

Beeby Zenut died in the year 1809, and the affairs of the establishment were conducted by *Meer Khadim Hoossain,* who was a nephew of her's, and a cousin of the appellant.

Meer Khadim Hoossain managed the property for four years, and died about 1219 *Fusly* (or 1812), leaving the respondent, his widow, in possession of the property which he had superintended.

About this time the appellant, who had then succeeded his father, was enabled to absent himself from *Bhogulpore,* and went to *Patna* to take possession of the property.

On his arrival at *Patna* for that purpose, he found that the respondent, who on the death of her husband had been left in possession, claimed it as her own.

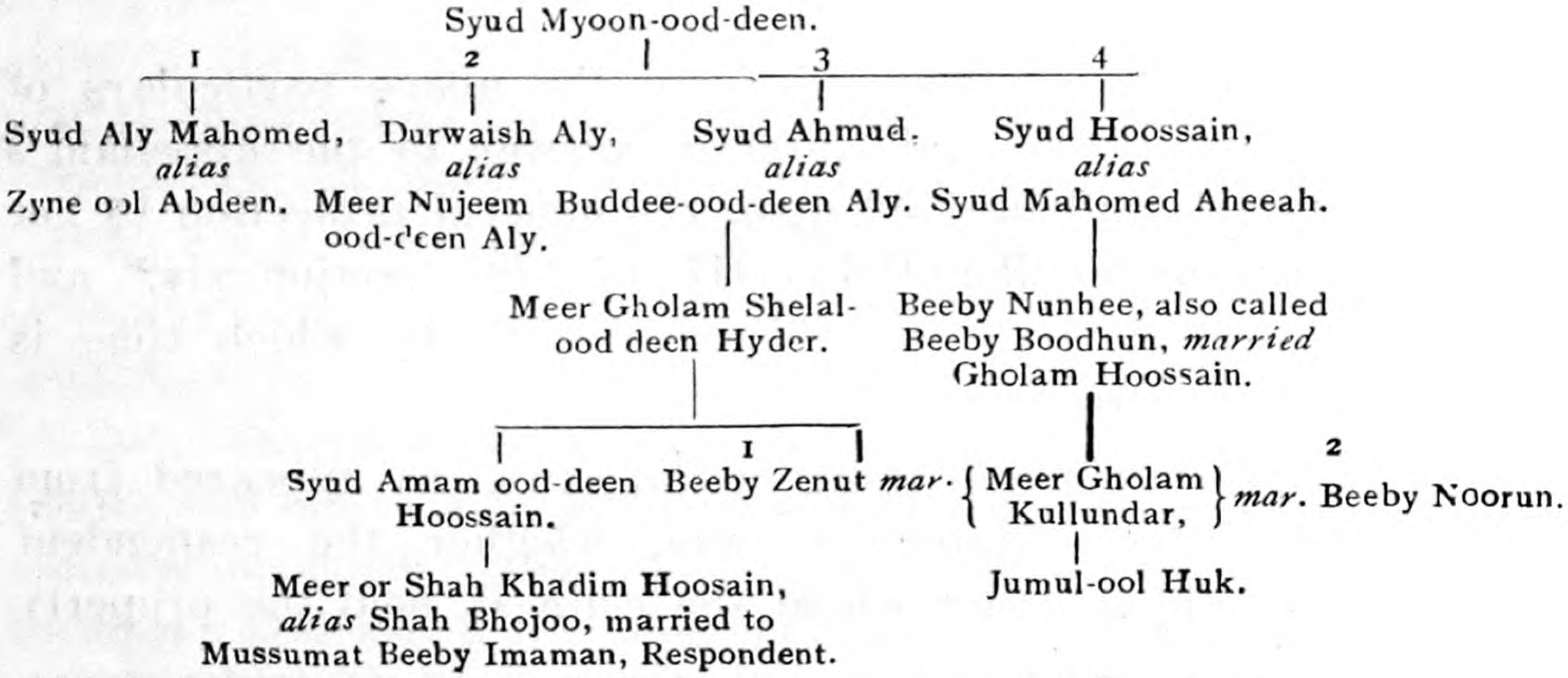
1836.

MEER USDOOLLAH
v.
MUSSUMAT BEEBY IMAMAN.

Upon this he filed his plaint against her, stating the circumstances above detailed, and praying to be put in possession of the property.

The respondent was the widow of *Meer Khadim Hoossain,* upon whose death she had taken possession of the estates in question; and from whom she claimed, relying upon his possession, and that of his ancestors, for more than a century previous to the filing of the plaint.

The following table was put in to explain her defence in the suit :—


Syud Myoon-ood-deen.
1
2
3
4
Syud Aly Mahomed, *alias* Zyne ool Abdeen.
Durwaish Aly, *alias* Meer Nujeem ood-deen Aly.
Syud Ahmud. *alias* Buddee-ood-deen Aly.
Syud Hoossain, *alias* Syud Mahomed Aheeah.
Meer Gholam Shelal-ood deen Hyder.
Beeby Nunhee, also called Beeby Boodhun, *married* Gholam Hoossain.
Syud Amam ood-deen Hoossain.
1
Beeby Zenut *mar.*
Meer Gholam Kullundar,
mar.
2
Beeby Noorun.
Meer or Shah Khadim Hoosain, *alias* Shah Bhojoo, married to Mussumat Beeby Imaman, Respondent.
Jumul-ool Huk.

According to the above pedigree it appeared that *Nujeem-ood-deen,* who was one of the four sons of *Myoon-ood-deen,* and who was the common ancestor of both parties, died without issue in 1128 *Hijra,* or A.D. 1713. *Syud Mahomed,* and *Syud Ahmad,* two other sons, also died without issue. *Syud Hoossain* was the youngest son, and came into possession of the whole estate; he had issue a daughter, *Beeby Nunhee,* or *Beeby Boodhun,* who married *Meer Gholam Hussain,* who was also in possession. There was issue of this marriage a son, *Meer Gholam Kullundar,* who, after his father's death, came into possession. On the death of *Gholam Kullundar, Beeby Nunhee,* his mother, succeeded to the estate, in the character of guardian and agent to *Jumul-ool Huk,* his son, who was a minor, and who afterwards died at the age of eight years, whereupon *Beeby Nunhee* held possession in her own right. The estate was relinquished by *Beeby Nunhee,* in her lifetime, in favour of *Beeby Noorun* and *Beeby Zenut,* the two widows of *Gholam Kullundar*; the latter of whom being the survivor, became possessed of the entirety, which she granted to her nephew, the said *Khadim Hoossain, the* husband of the respondent.

The respondent set forth the above particulars of her pedigree and claim in answer to the appellant's plaint, and insisted upon the general protection to her title under Regulation III, of 1793, section xiv,* and Regulation II, of 1805, section ii, by which time is made a bar to certain claims.

The principal issue in the cause, as appeared from the above statement, was, whether the respondent and those under whom she claimed, held the property

---

* "The Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen previous to the 12th August 1765; or any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or that he had directly preferred his claim within that period for the matters in dispute, to a court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit; or shall prove that either from minority or other good and sufficient cause, he had been precluded from obtaining redress."

1836.

MEER USDOOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

in dispute as agents for the appellant's family, or in their own right.

To this answer the appellant replied.

And the respondent having filed his rejoinder, the cause was at issue; and the appellant, the plaintiff, produced the following proofs :—

1st. Several *firmans,* dated 1018 *Hijra,* 1058 *Hijra,* 22 *Safar,* 12th *Jaloos* (under the seal of *Aurungzebe,* or *Alumgeer Shah*), 1060 *Hijra,* 1069 *Hijra,* 1075 *Hijra,* 27th *Shawal,* 31 *Jaloos* (also under the seal of *Aurungzebe or Alumgeer*), 17*th Zilkada,* 34 *Jaloos* (under the like seal), 7th *Zehijja,* 7th *Jaloos,* being royal grants and confirmations of the different villages mentioned in them: some to the dependants of *Nujeem-ood-deen,* some to the dependants of *Syud Aly Mahomed* and *Syud Hoossain,* retainers of *Nujeem-ood-deen,* and some to other persons.

2nd. Two documents, one being a conveyance of *mouzah Tulmur,* one of the disputed villages, to *Syud Hoossain,* dated 1105 *Hijra,* A.D. 1691, and a *perwanna** granted to the same person as *Sijjada-nashin.*

3rd. A copy of a grant from *Beeby Boodhun* in favour of *Beeby Zenut* and *Beeby Noorun. Perwannas* from the *English* office for the inspection of *sunnuds,*† whereby the possession of *Beeby Zenut* and *Beeby Noorun* is recited and confirmed. The grant from *Beeby Zenut* to *Khadim Hoossain.* Receipts from the collector's office of *kyfeeuts* or reports made to that office, whereby *Khadim Hoossain* is recognized as owner of some of the villages in dispute; and copies of reports dated 1797, from the same office, from which it appears that *Khadim Hoossain* was then in possession, and claimed to be entitled, as owner, to divers other parts of the property in possession.

---

* Precept or warrant.

† Deeds of grant.

The appellant also produced witnesses to establish the facts necessary to the proof of his title. One of them (the most important from the extent and antiquity as well as from the nature of his evidence), *Jan Aly,* a man of seventy-five, deposed, that the property, which he very particularly specified, had been the estate of *Nujeem-ood-deen Aly*; that it had been settled by him on his wife; that the wife had conveyed it to *Syud Usd-oollah* (which conveyance had actually been seen by his uncle, who had told the witness of it); and he spoke to the successive appointments of *Gholam Moozuffer, Gholam Hoossain,* and *Gholam Kullundar,* to the managership, to the contents of a letter alleged to have been written by *Beeby Zenut* to the appellant's father for the managership and the purport of the *sunnud* in reply, and to the payment to the appellant's father of four thousand rupees on account of the rents in *Gholam Kullundar's* time.

The same kind of evidence was given by *Meer Kulloo,* and witnesses generally were called to prove payments of money from the estate in three several years, 1184, 1200, and 1209 *Fusly*; the provision for the expenses of the marriage of the appellant and his son, one forty years, the other three years before, out of the produce of the estates; the restoration, in one instance, in 1203 or 1204 *Fusly,* of a person who had been turned out of his house by *Beeby Zenut,* upon a letter from the appellant; and acknowledgments made on three or four occasions by *Beeby Zenut,* or *Beeby Zenut's* servants, to the witnesses, or to persons who

1836.

MEER USDOOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

told the witnesses, that the appellant was the master and that she was only a manager.

After these witnesses had been examined, the appellant's remaining witnesses were called, when his vakeel stated that his client restricted the proof of his claim to the evidence already delivered in by his witnesses, and that it was unnecessary to take the depositions of any more.

The respondent then proceeded to prove the actual exercise of ownership by herself, her husband, and his predecessors, during a period of nearly sixty years, by putting in, in addition to the private and public documents evidencing the same facts, which the appellant himself had already given in evidence, a series of mortgage deeds and leases executed respectively by *Gholam Kullundar, Beeby Boodhun, Beeby Zenut, and Beeby Noorun,* in the years 1171 *Hijra,* 1168 *Fusly,* 1179 *Hijra,* 1188 *Hijra,* 1195 *Hijra,* 1198 *Hijra,* 1207 *Hijra*; a conveyance by *Beeby Noorun* of her share and proportion of the estate executed in favour of *Beeby Zenut,* dated 1202 *Hijra;* the proceedings in a suit instituted in the *Patna* City Court, in 1783, against *Beeby Zenut,* with respect to a mortgage, from which it appeared there had been another suit against *Mussumats Noorun* and *Zenut* in 1774, arising out of the same transaction; the decree in a suit in the same City Court, instituted by *Mussumats Zenut* and *Noorun* against *Fatima Khan,* in another mortgage transaction, dated 30th *January* 1789; and a decree in the Zillah Court of *Tirhoot,* in a suit also instituted against *Beeby Zenut* in 1793; also relating to a mortgage and several leases granted by *Khadim Hoossain* in 1214 *Hijra,* 1217 *Fusly,* and 1220 *Hijra.*

The respondent also examined as witnesses thirteen persons who were connected and acquainted with the property, and who deposed to the fact of the possession of the estate by herself, her husband (*Khadim Hoossain*), *Beeby Zenut, Beeby Noorun,* and *Beeby Boodhun,* respectively as acknowledged owners and proprietors.

Several of these witnesses also produced grants and leases from those persons, under which they had long held and were still holding parts of the estates.

At this stage of the proceedings the appellant, in order to strengthen his case, called three further witnesses; two of them to depose to the purport of a letter already spoken to by the witness, *Jan Aly,* and alleged to have been sent by *Beeby Zenut* to the appellant's father, fifty-three years previously, requesting the situation of manager of the estates, and of the "*sunnud*" sent in reply, and all three to prove payments of money by *Beeby Zenut* to the appellant's father, in 1200, 1203, and 1209 *Fusly.*

The appellant also put in further documentary evidence, consisting of the following particulars, *viz.* a *firman,* or grant and confirmation of the village *Tulmur Boozoorg and Khoord* (a principal part of the estate) to *Syud Aly Mahomed* and *Syud Hoossain,* dated 1712 A.D.; an extract from Mr. *Vansittart's* records, in which some part of the property is stated to have been granted in the name of *Nujeem-ood-deen,* and other part in the names of *Syud Hoossain* and *Mahomed Aly*; a *soorut-hal,* purporting to have been made by *Gholam Kullundar,* declaring the nature and particulars of his title, and which the appellant filed for the purpose of showing a variance between it and the conveyance from *Beeby Boodhun,* which had been filed by the respondent; and three documents, pur-

1836.

MEER USD-OOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

porting to be letters under the seal of *Beeby Zenut,* addressed to the appellant and his father, in which, either directly or in effect, the property in dispute was acknowledged to be that of the persons addressed, and that *Beeby Zenut* was their agent and manager; and four other documents, purporting to be copies under the signature of the Judge of *Bhogulpore,* of 1st, a *soorut-hal,* or statement of facts, in the name of *Gholam Hoossain,* in which the property was expressly recognized as that of *Beeby Asmah* by marriage settlement, and to have been transferred by her to *Syud Usd-oollah,* the appellant's grandfather; 2nd, a deed of relinquishment dated 1774 A.D., in the name of *Beeby Boodhun,* which in all respects corresponded with the appellant's statement of his case; 3rd, a *durkhast* or petition of *Beeby Zenut* addressed to the appellant's father, requesting the appointment of manager of the estate; and 4th, a *perwanna* of the appellant's father granting the managership accordingly.

On the 23rd *May* 1815, the second judge of the Provincial Court of *Patna* (the Hon. *James R. Elphinstone*), after a patient and careful examination of the evidence, ordered "That the decree be awarded in favour of the appellant, that he obtain possession and occupancy of the villages and estates in dispute. That the defendant (now respondent) pay all the costs; and that it be at the option of the plaintiff to enter a separate suit in the usual form for the amount embezzled, previous and posterior to the institution of the suit."

From this decree the respondent appealed to the Sudder Dewanny Adawlut, and in the petition of appeal, and in her reasons of appeal subsequently filed, among other things objected to the testimony adduced

DEPARTMENT OF LAW
LIBRARY
UNIVERSITY OF KASHMIR

1836.

MEER USDOOLLAH
v.
MUSSUMAT BEEBY IMAMAN.

by the plaintiff, and the reasons assigned for its judgment by the Provincial Court.

To these the now appellant put in an answer.

The then appellant (now the respondent) delivered in as further evidence a decree of the Zillah Court of *Bhogulpore,* pronounced 6th *March* 1794, in a suit in which *Beeby Boodhun* was plaintiff, and *Syud Mahomed Meer* was defendant.

This decree and previous proceedings were produced by the respondent in order to show that the defence there adopted by *Syud Mahomed Meer* was inconsistent with the fact of his either having or being entitled to actual possession of the property now in dispute.

The present appellant also filed, as further evidence, an order of the same Court in the same suit, touching certain documents which the appellant had then produced, amongst which were a *soorut-hal of Meer Gholam Hoossain, Beeby Boodhun's* deed of relinquishment, *Beeby Zenut's durkhast* for the managership, and *Meer Mahomed Kassim Khan's perwanna.*

These documents appeared to have been proved in the last-mentioned cause; but having been considered by the Zillah Court of *Bhogulpore* as irrelevant in the suit then depending, the originals were returned to *Beeby Noorun's Vakeel,* and copies of them were, by the order of the Judge, preserved in the Zillah Court office.

The Sudder Adawlut took the four documents transmitted by the Provincial Court out of the "record" of the original suit, and sent them to the Zillah Court of *Bhogulpore* to be compared with the copies of the same documents retained by that Court.

1836.

MEER USD-OOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

Respecting these documents, the Sudder Dewanny Adawlut thought it necessary to direct a precept to the Court at *Bhogulpore,* requiring that Court to transmit to them the original proceeding and papers then in their office, connected with the case of *Mussumat Noorun* v. *Syud Mahomed Meer.*

The four documents above specified were accordingly transmitted. On the 26th *September* 1817, the Sudder Dewanny Adawlut pronounced the following judgment :—

"On an attentive perusal of all the papers, and on examination into all the pleas of the parties in this case, the Court observes, That the respondent, on the 14th *September* 1813, (English era,) prosecuted the appellant in the *Patna* Provincial Court, for entry into the villages, lands, and dwellings, the effects of *Mussumat Asmah,* his great-grandfather's own sister and his earlier predecessor, rated at the sum of rupees 1,27,030, the tenfold amount of one year's produce of the said villages, and 1,500 rupees, the value of the dwellings, forming an agrregate of rupees 1,28,530, on the following grounds :—

"That *Beeby Asmah,* the wife of *Meer Nujeem-ood-deen,* possessed, in virtue of her marriage settlement, all the real and personal property, the effects of her husband, and appointed her father, *Syud Ali Mahomed,* and her own brother, *Syud Hoossain, mokhtars** on her part to superintend and administer the same, in whose name she procured a *firman* for the cession of several of the said villages.

"That the said *Mussumat* afterwards transferred the above-mentioned property to *Syud Usd-oollah,* the plaintiff's grandfather, and died. That the plaintiff's grandfather left *Syud Moozuffer* manager of the *mash*, after whose death *Meer Gholam Hoossain* was appointed to that office. That after the respondent's grandfather and the said *Gholam Hoossain* died, *Gholam Kullundar* was delegated to the managership on the part of the respondent's father, on whose demise his wife, *Mussumat Zenut*, presented a *durkhast* to the respondent's father, soliciting the office, which was sanctioned. That when, in 1216 *Fusly*, the said *Mussumat* died, *Meer Khadim Hoossain* conducted the affairs of the *mash* in dispute for four years, who also dying in 1219 *Fusly*, his wife, *Mussumat Beeby Imaman*, had possession of same.

---

* Agents.

"The plaintiff, however, has not brought forward a single argument, or in any other manner established either the truth of his allegations, or the proof that *Beeby Asmah* did, in point of fact, receive the said *mash* as a marriage settlement, or did transfer it to his grandfather. And although the said respondent for the purpose of proving that the appellant and her ancestors held possession of the *mash* in dispute merely as managers, has filed the following papers—copy of a deed of relinquishment dated 19th *Shaban*, 1181 *Hijra*, executed by *Beeby Boodhun*, the mother of *Meer Gholam Kullundar*, *Mussumat Zenut's* husband; copy of a paper dated 6th *Ramazan*, 1176 *Hijra*, written by *Beeby Zenut* to *Syud Mahomed Meer*, the respondent's father; and copy of a *sunnud* dated 17th *Shuhur Shawal* 1176 *Hijra* in *Mussumat Zenut's* name, granted in compliance with her *durkhast*;—and although he has verbally stated, that when *Mussumat Noorun*, the second wife of *Syud Mahomed Meer*, the respondent's father, prosecuted her husband,

1836.

MEER USDOOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

she delivered in the original papers into Court, received them back, and deposited copies in their stead, —still it is abundantly manifest, from the whole of the proceedings in the case of *Mussumat Noorun* v. *Syud Mahomed Meer,* that *Mussumat Noorun* never instituted against her husband a suit of such a nature as to require the filing of those papers in proof of her claim. On the contrary, it appears from a proceeding of the *Bhogulpore* Court, dated 6th *February* 1794, (English era,) under the hand of Mr. *John Fombelle,* that the said gentleman, in consequence of the irrelevancy of those papers to the cause, ordered them to be returned to the vakeel of *Mussumat Noorun,* and copies of them to be preserved in the office.

" Moreover, on inspecting the documents from which the said exhibits were copied, which had been retained in the office of that *zillah* to the present time, it appears that none of them are signed by any superior officer of the Court; but from the copy of Mr. *John Fombelle's* signature being affixed to the said documents from which the extracts are copied, it is evident that those exhibits are copies from copies, and not, as the respondent asserts, copies from originals; consequently, such copies of copies, the originals of which are not discoverable, are in every respect unworthy of credit in a Court of Justice.

" As the contents of the paper written by *Beeby Zenut,* of the deed of relinquishment, and of the above *sunnud,* and the purport of the plaint filed by the respondent, correspond,—and as, exclusive of this, the respondent possesses not a single argument to verify his allegation or to substantiate his right,—the Court is satisfied that the respondent has forged the copies in the office, inserted them in the records of the Court,

1836.

MEER USD-OOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

procured copies of them under the Judge's signature, and thus established a ground for the present prosecution. Reasoning from analogy, such having been his mode of proceeding, it is clear and evident beyond doubt, that he has fabricated and forged all the letters which he asserts to be originals, and written by *Beeby Zenut* to his father; wherein she acknowledges the respondent's right and her own managership: the Court is therefore of opinion, that they do not in any shape tend to benefit the respondent's claim.

"From the purport of the reply of the original *firmans* and *sunnuds*, and of the other documents filed by the appellant, it is fully proved that the following persons have successively held the *mash* in dispute: First, *Meer Nujeem-ood-deen*, the son of *Myoon-ood-deen*; after his death, *Gholam Hoossain*, husband of *Beeby Nunhee*, alias *Beeby Boodhun, Meer Nujeem-ood-deen's* own niece; after his demise, *Gholam Kullundar, Gholam Hoossain's* son; after his (*Gholam Kullundar's*) death, his mother, *Mussumat Nunhee;* in succession to her, *Mussumats Zenut* and *Noorun, Gholam Kullundar's* wives, in virtue of the said *Beeby Nunhee's* transfer; afterwards, *Mussumat Zenut,* in right of her co-existent wife's (*Mussumat Noorun's*) transfer of the whole *mash* to her; then, in virtue of the said *Mussumat Zenut's* transfer, *Shah Khadim Hoossain,* the husband of *Mussumat Beeby Imaman,* the appellant; and lastly, after his death, *Beeby Imaman* herself.

"All which persons have ever since, and even prior to the reign of *Shah Alumgeer,* uninterruptedly held and enjoyed the said *mash* in person in their own right, and not as the plaintiff's ancestors' managers, without dispute or interference on the part of any person whatsoever; and that, consequently, the respondent's action, which is entirely grounded on fraud, forgery, and villany, ought, in every point of view, to be dismissed.

"Adverting to the reasons above stated, a final order and decision is passed, that the decree of the Second Judge of the *Patna* Provincial Court, dated 23rd *November* 1815, (English era,) be cancelled and reversed, and a decree awarded in favour of the appellant. That on the enforcement of this decree, the appellant do hold possession of the disputed *mash* as heretofore."

The appellant, feeling himself deeply aggrieved by so serious an imputation on his character as the judgment of the Court of Sudder Adawlut inferred, without any proof having been required or adduced of the truth of the assumptions on which that judgment proceeds, preferred a petition of appeal therefrom to His Majesty in Council, and humbly hoped that the same might be reversed, and the decree of the Provincial Court established and affirmed, for the following amongst other reasons :—

I. Because the Sudder Dewanny Adawlut, in reversing the decree of the Provincial Court, acted upon a groundless presumption of forgery, of which there was no investigation and no proof, and without paying due attention to the documentary and oral testimony, which had been so carefully and deliberately sifted and weighed in the Provincial Court before judgment therein was pronounced in favour of the appellant.

II. Because, both by the documents produced and the testimony of the respectable and credible witnesses examined, and who were personally examined by the Provincial Judge, it was clearly proved that *Beeby Zenut* was in possession of the property in question, not as

1836.

MEER USDOOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

owner, but merely as agent and manager for the appellant and his father.

The respondent, on the other hand, humbly hoped the appeal might be dismissed, and the decree of the Sudder Dewanny Adawlut confirmed, for the following among other reasons :—

I. Because the appellant's claim, if in other respects well founded, was barred by lapse of time.

II. Because the appellant failed to establish, by credible evidence, his allegations of title and ownership to the property in question.

III. Because, upon the balance of the testimony adduced by the respective parties, considered with reference to its respectability, it was manifest that the respondent, and those under whom she claimed, were or had been in possession of the estate as owners, and not as managers or trustees for the appellant or his ancestors, as by him alleged.

Mr. *Miller,* K.C., and Mr. *Wigram,* K.C., for the appellant.

Mr. Serjeant *Spankie,* and Mr. *Lloyd,* for the respondent.

Mr. Baron PARKE :

7 December

Their Lordships are called upon in this case to pronounce their opinion on a single question of fact, with respect to which, however, there is a great mass of documentary and parol evidence on both sides, and conflicting decisions of the Provincial and Sudder Dewanny Courts, between which we are left to decide, without much assistance in investigating the truth from either. We must therefore determine for ourselves, in the best way we are able, upon the evidence, oral and written, which was adduced on both sides, and which has been laid before us and very elaborately discussed.

The plaintiff (the appellant) seeks, by the original suit commenced in 1813, to recover from the defendant a property of which he was then in possession. This circumstance alone throws upon him the burthen of proof. He was bound to show, to the satisfaction of the Court, that he had a just title to the possession. The nature of the property is not very clearly explained, but it is certain that it had the character of real estate, being a part of the land-revenue of a certain district originally granted by the Mogul government for religious purposes, or rather burthened with a religious obligation, and subject to it, to be enjoyed by the grantees for their own benefit. This property is denominated a *muddud-mash*. It had been undoubtedly in the actual possession of those under whom the defendant claimed, and of the defendant herself, prior to and since the year 1761 down to the commencement of the suit. The plaintiff deduced no title to himself by proof of any conveyance from the original grantees of the Moguls, or from any of the persons who had been in possession: he was obliged, therefore, to claim on the ground that the possession of the defendant and her predecessors was legally his own, and that the persons in the actual occupation or receipt of the profits were his agents, and received them on his account. The single question of fact was, in effect, the only question in the cause, and the plaintiff was bound to prove the affirmative. The course which he took for this purpose was, in the first instance, to prove, by several witnesses, payments of money by *Meer Gholam Kullundar*, who was in pos-

1836.

MEER USDOOLLAH
v.
MUSSUMAT BEEBY IMAMAN.

session prior to and about 1760, and by *Beeby Zenut,* who subsequently occupied. Those made by her were stated to have been in 1767 or 1777, on the occasion of the plaintiff's marriage; also in 1793 and 1802: and such payments in all amounted to between ten and eleven thousand rupees. He also gave evidence of the expenses of the plaintiff's marriage having been defrayed out of the revenue, and that the ceremony was performed in 1777, when he acted as *malik* or owner; and the like on the occasion of the marriage of a son (whether the same or a different one is left uncertain) in 1793 and 1812. One witness spoke to an act of ownership in the plaintiff or his father in 1783, *Beeby Zenut* having restored, by his order, the witness's father to a house from which he had been removed; and several others deposed to declarations of *Meer Gholam Kullundar* and of *Beeby Zenut* on different occasions, and particuarly in 1776 and 1777, and even by *Shah Khadim Hoossain* in 1812, that the plaintiff was the real owner of the *mash;* and the case was then closed. But in a subsequent stage, and a very short time before the judgment was given, the plaintiff gave more parol evidence, and produced three letters appearing to be under the seal of *Beeby Zenut,* each recognizing the plaintiff's title and that of his father, and he exhibited six copies of papers from the Court of *Bhogulpore,* one of which purports to be a deed of relinquishment from *Beeby Boodhun* to *Beeby Zenut* in 1767, a *durkhast* or petition from *Beeby Zenut* for the management, dated in 1762, and a grant of the management accordingly. The last, if genuine and duly proved, would have been decisive in the plaintiff's favour; but these six documents were considered by the Sudder Court as forgeries, and upon that assumption the decree of that

1836.

MEER USDOOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

Court was founded. A great suspicion undoubtedly attaches to them. But it is not necessary to discuss the question whether there was sufficient proof that they were actually forged; because, at all events, the *copies* were inadmissible, for there was no evidence of a search for the originals. These six papers must therefore be altogether dismissed from the case for that reason, and it must rest, on the part of the plaintiff, on the other documents and the oral testimony.

On the other hand, the defendant called many witnesses to prove that she, and those under whom she claimed, acted and were always treated as the owners of the *mash*; that the plaintiff and his ancestors were never supposed to be so; and several deeds were put in, proving a dealing with the property from a very early period. There were two mortgages from *Meer Gholam Kullundar* in 1756 and 1761, showing that he was then acting as owner. In 1765 *Beeby Boodhun* mortgaged the property. A deed was then put in of the date of 1768, dividing the whole between *Beeby Zenut,* to whom eight shares were assigned, and *Beeby Noorun,* who took seven. That both were subsequently in possession was proved by their joining in a lease in 1775, and by one leasing in 1782 her seven shares, and the other mortgaging her eight shares in 1783. This possession of both is shown by *perwannas* to have continued in 1786, and is said to be an absolute possession; and there is parol evidence on the cross-examination of the plaintiff's witness *Mahto,* and the examination of the defendant's witness *Bux,* that both were at one time in possession, for the latter mentions that there were two *cutcherries.** A conveyance was then proved of *Beeby Noorun's* share to *Beeby Zenut*

---

* Office of collectors of revenue.

1836.

MEER USDOOLLAH *v.* MUSSUMAT BEEBY IMAMAN.

in 1789; after which, in 1791 and 1793, the latter leases as sole owner, and conveys the whole, in 1796, to *Shah Khadim Hoossain,* her nephew, of whose actual possession in 1794 parol evidence was given; and four leases, two of the subsequent dates of 1799, 1800, and two of 1805, were produced, all purporting to be made by *Shah Hoossain* alone, and proving that he acted as owner from that time.

From this outline of the defendant's case, so far as I have stated, and without adverting to two important facts which I shall afterwards notice, it appears that a title is deduced from *Beeby Boodhun* to the defendant, and confirmed by regular acts of ownership exactly corresponding with the documentary title. On contrasting this case with the plaintiff's, several observations occur in favour of its truth. So far, indeed, as relates to the acts of ownership of *Beeby Zenut,* it is not absolutely inconsistent with the plaintiff's case, which admits her to be in possession, and, being so, she might deal with the estate by leasing and mortgaging it as her own; but the acts of ownership of *Beeby Boodhun* and *Beeby Noorun* are altogether inconsistent, and cannot be explained upon the plaintiff's hypothesis; and they are very distinctly and satisfactorily proved. Again, the admissions of title sworn to as having been made by *Meer Gholam Kullundar, Beeby Zenut,* and *Shah Khadim Hoossain* or *Borge,* are wholly at variance with their solemn acts; for these declarations are said to have been made about the very times that these persons were actually conveying the property as their own : and it is impossible to suppose that, when they were acting as owners and in their own right, they should be admitting to witnesses that they had no right at all. Much greater credence is to be given to their acts than to their alleged words, which are so easily mistaken or misrepresented. As to the proof of payments, their amount is small compared to the actual revenue ; and it may be true, that, considering the connexion of the families, (for the plaintiff married *Beeby Zenut's* niece,) money has been occasionally sent as an act of bounty, and the expenses of the marriage of the plaintiff may also have been defrayed, in part or in all, by her. But if the proceeds of the *mash* had really belonged to and been remitted to the plaintiff down to the commencement of the suit, which the plaintiff alleges, whatever difficulty there might have been to have proved such payments at a more remote period, there certainly would have been none in giving abundant evidence, in recent times, by numerous living witnesses ; but the proof, instead of growing stronger, becomes weaker, the nearer we approach to the present period, and no remittances whatever are shown to have occurred since 1802.

The restoration of the witness, *Mahto's* father, in 1783 by *Beeby Zenut,* at the request of the plaintiff's father, may have a foundation in truth, without leading to the inference that the father was the *malik ;* and it is to be observed, that it is at variance with a fact asserted by other witnesses of the plaintiff, namely, that in 1776, seven years before, the plaintiff himself was the owner of the property.

I proceed to the written evidence. The three letters alleged to be from *Beeby Zenut* are open to much observation : they were brought forward late in the cause, after the plaintiff's vakeels had closed their case, the last of them on the very day of the decree, when the opposite party had no opportunity to contest their genuineness, and that was not proved except by the similarity of the impression of the seal with that of a seal produced by the defendant.

The first of these letters which, according to the testimony of a witness named *Gholam Hoossain,* was written in 1793, is addressed to *Mahomed Meer* as the *malik,* whereas it is proved by several of the plaintiff's witnesses that the plaintiff himself filled that character in 1776. The second, dated 1797, might, if true, have been confirmed by the production of the account therein referred to ; and if it had been really written by *Beeby Zenut* to the plaintiff, it is singular that, after the strong entreaties it contains that the plaintiff would come over on account of her age, infirmity, and failure of sight, he should have permitted her still to continue his agent till her death, which happened nine years afterwards.

The third letter is open to no observation peculiarly belonging to it, but all are very inconsistent with the solemn acts, leases, and mortgages, proved on the other side on corresponding dates : a lease in 1765 by *Beeby Boodhun,* in 1793 by *Beeby Zenut,* and a conveyance by the latter in 1795 to *Shah Khadim Hoossain* of all his estate.

We should therefore feel little difficulty in deciding on which side the truth lay, if we had nothing else to guide our judgment than the comparison of these conflicting acts and declarations, parol and written, on one side and on the other ; but we are not thus confined. There are some other facts which are established beyond all possibility of doubt, and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life.

Now there were two facts most distinctly established. The first was, that in pursuance of a notice given according to Regulation XXXVII, 1793, section xx, *Shah Khadim Hoossain* in 1797 entered his claim in the public records as the owner of this *mash,* deriving his title by grant or *tumleek-namah* from *Beeby Zenut* dated in 1796, and no proof was given on the part of the plaintiff that he ever was, or claimed to be, registered as the owner. The second fact was, that although the plaintiff's case proceeded on the ground that *Beeby Zenut* and *Shah Khadim Hoossain* were in possession as his agents, and accounted to him for the profits, yet he produced no single account-current or *duftar* for any part of the time. These two facts, then, being undoubted, we have to consider whether the case on the part of the plaintiff can be reasonably reconciled with them. If that case were true, is it likely that the claimant, who lived fifty or sixty miles from *Patna,* would have abstained to bring forward his claim on so important an occasion as that which occurred, when the Government called upon all persons having title to property of this description to appear and enter it on public registers, in order to prevent its being forfeited to the Government? This fact is most important, not because the registers themselves are at all of the nature of conclusive evidence of title, (for the Regulations provide against that,) but because this act of registration after a proclamation amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof

ADVOCATE

1836.

MEER USDOOLLAH v. MUSSUMAT BEEBY IMAMAN.

of the ill health of the claimant, or absence in a distant country, or ignorance, afford an equally strong presumption of the non-existence of any title on the other. Again, if the plaintiff was for near fifty years the owner, having either the whole of the *mash* or the surplus of its revenues, after satisfying the supposed religious purposes for which it was given, is it to be believed that he would not have had a regular annual account, at all events some occasional statement, from his agents, of the receipts and disbursements? And we have the means of knowing, from the assistance we receive at this Board from persons conversant with the subject, that the natives are particularly exact in keeping written accounts.

For these reasons we are of opinion, that the weight of evidence is in favour of the defendant, and that the claimant has by no means satisfied the exigency of the law, which throws on him the burthen of proof. We therefore affirm the decree of the Sudder Dewanny Adawlut, and we are of opinion that it must be affirmed with costs.

Sorab-jee Vacha Ganda . . . . *Appellants,*

v.

Koonwur-jee Manik-jee . . . . *Respondent.**

On Appeal from the Court of Sudder Dewanny Adawlut of Bombay.

Evidence—Suit for balance of accounts—Defendant denying accounts—Proof required—Plaintiff's books of accounts, if sufficient proof.

The Sudder Adawlut Court of *Bombay* having, on the hearing of a cause, permitted an account-current to be proved by the entries in the plaintiff's *dufters* or account-books, and decreed the defendant to pay the balance upon that evidence, unsupported by oral testimony, and notwithstanding the denial of any sum being due by the defendant in his answer; held by the judicial committee that under such circumstances the books of account of the plaintiff cannot be used singly as evidence against the defendant, and that the decrees founded thereon must be reversed.

This was an appeal from three several decrees of the Sudder Dewanny Adawlut at *Bombay,* two of them affirming on appeal decrees of the Provincial Court at *Surat,* whereby the judgments of the Zillah Court at *Surat,* pronounced in favour of the respondent in two suits brought by him in that Court against the appellant and his brother, *Munjee-bhaee,* sons of *Vacha Ganda,* were affirmed ; and the third decree, affirming a decree of the Provincial Court, whereby upon the appeal of the present respondent, the judgment of the Zillah Court in one of the suits was in part reversed. 1 December 1836.

Vacha Ganda Bheem-jee, a parsee, the father of the appellant *Sorab-jee Vacha Ganda* and *Munjee-bhaee,* was an inhabitant of *Surat,* but about the *Hindoo* year 1846 (A.D. 1790) went to reside at *Bombay,* where he carried on business as a merchant until A.D. 1800, in which year, being afflicted with insanity, his family and himself took up their residence at *Surat,* and his affairs were thenceforth carried on by his sons in his name ; in the course of which they opened an account with the respondent in their father *Vacha Ganda's* name, and beginning in the year A.D. 1800.

---

* Present : Lord Brougham, the Vice-Chancellor (Sir L. Shadwell), Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy, and Sir Alexander Johnston.

Vacha Ganda Bheem-jee, together with his brother *Hormuz-jee Bheem-jee,* became entitled, on the death of their father *Bheem-jee Rustom-jee,* to certain lands and houses at *Surat,* and considerable outstanding debts, as his coheirs. *Vacha Ganda Bheem-jee,* though he occasionally visited *Surat,* resided principally at *Bombay*; *Hormuz-jee Bheem-jee* resided constantly at *Surat.*

It having become expedient, at the period of *Vacha Ganda's* becoming insane, to make a division of these debts, an agreement was, through the mediation of the respondent, who was a relation of the family, entered into in 1800, between *Hormuz-jee* on the one part, and the appellant and his brother, acting on behalf of their father *Vacha Ganda Bheem-jee,* on the other. By this agreement *Hormuz-jee* was to take for his share twenty of the outstanding debts, and the apppellant and his brother were, on behalf of their father, to take a debt outstanding at *Bombay,* and to receive from *Hormuz-jee* 13,000 rupees by an order on the respondent. A deed of mutual release and assignment was accordingly executed by *Hormuz-jee,* and the appellant and his brother on the part of their father *Vacha Ganda Bheem-jee,* on *Chyte-sood* 2nd *Sumvit* 1856 (A.D. 27th *March* 1800); and the respondent gave an acknowledgment, or promissory note, to pay *Vacha Ganda Bheem-jee* 13,000 rupees, with nine per cent. interest, on account of *Hormuz-jee.*

Vacha Ganda Bheem-jee died at *Surat* in *April* 1801. The appellant and his brother *Munjee-bhaee* took out letters of administration of his estate and effects in the Recorder's Court at *Bombay* on the 8th *May* following, and on the 3rd *March* 1802 filed an inventory of them in that Court.

Upon the death of his father the appellant settled at *Bombay,* where he carried on business as a merchant in his own name : his brother *Munjee-bhaee* established himself at *Surat,* where he carried on business in the family name of *Vacha Ganda.*

About 1812 or 1813 *Munjee-bhaee* failed ; and on the 6th *April* 1813 the respondent filed a plaint in the Zillah Court of *Surat* against the appellant and *Munjee-bhaee,* in which he stated, that, in the *Sumvit* year 1856, (A.D. 1799-1800,) the appellant and *Munjee-bhaee* began to have dealings with him in their father's name ; that the account was regularly adjusted by the *gomashtahs** of both parties up to the *Sumvit* year 1860 ; (A.D. 1803-4 ;) that the transactions of *Sumvit* 1861, (A.D. 1804-5,) up to the last day of the month *Assin,* (*October* 1805,) were examined on the 9th *Poos-sood* 1862, (A.D. *December* 1805), at which time there appeared a balance in his favour of rupees 7,132. 1q. 60r. ; and that some time after this his *gomashtah, Peshtun,* fraudulently took away several documents from his house, amongst which were letters from the appellant, recognizing his debt and assuring him of payment. He then stated, that his claim against the appellant and his brother on this alleged account-current amounted to rupees 7,132. 1q. 60r. principal, and rupees 6,556. 3q. 16r. interest, from which he had deducted rupees 2,125 principal, and rupees 2,070.

---

* Agents or confidential representatives.

3q. 6r. interest, amounting to rupees 4,195. 3q. 6r., on the acceptance of *Hormuz-jee Bheem-jee,* who, however, had not then paid him a rea, leaving a balance against the appellant and his brother of rupees 9,493. 1q. 69r., of which he claimed payment.

To this plaint the appellant and his brother *Munjee-bhaee* put in separate answers. *Munjee-bhaee* insisted, in his answer, that a balance was, in fact, in his favour ; but that the respondent had, in collusion with *Hormuz-jee,* got possession of his (*Munjee-bhaee's*) account-books, and otherwise acted fraudulently on the occasion. The appellant, in his answer, insisted that the claim was false, that the respondent was, in fact, indebted to him for his share of the 13,000 rupees for which the respondent had given his acknowledgment, as before mentioned . The appellant also denied having settled accounts with the defendant's *gomashtah,* or written a letter from *Bombay* to the effect alleged in the plaint, or knew any thing of the acceptance of *Hormuz-jee Bheem-jee.* He called upon the respondent to produce his hand-writing; he also denied that any person had any claim on his father's property at *Surat,* and, as a presumption of the falsity of the respondent's claim, asked why the respondent had not mentioned the claim before, as the appellant had been several times at *Surat.*

A reply was put in to this answer, to which the appellant and *Munjee-bhaee* rejoined. The plaintiff then produced his own books to prove the balance due to him, and the following letter, dated *October* 1803, from *Modee Sorab-jee Vacha Ganda* in *Bombay* to the plaintiff at Surat, as evidence of the existence of the partnership between the appellant and *Munjee-bhaee,* and their dealings with him.

1836.

SORAB-JEE VACHA GANDA *v.* KOONWUR-JEE MANIK JEE.

(After compliments.)

"I had a letter from *Munjee-bhaee* a few days ago, mentioning your having conferred a great obligation on us, by advancing rupees 3,500, and that my uncle *Hormuz-jee,* after declaring his want of ready-money, had offered some bags of pearls on which he might raise rupees 12,000. In reply to which I have written as follows :—

" '*Koonwur-jee* has acted kindly, and his support is very seasonable. If you had asked *Hormuz-jee* for his pearls, he would have refused to lend them ; and he now offers them, knowing you could not ask such a favour of him. I am astonished at your writing about this. There was a little delay in procuring the *hoondee,** by *Peshtun-jee's* promising to give it from day to day, and saying your master would grant one for rupees 8,000 ; it was, however, at last obtained for 15,000. I received a very abusive letter in the meantime from *Munjee-bhaee,* in which he mentions that "*Koonwur-jee* has told me through *Peshtun-jee* that he has no money to lend, and that any application is therefore useless." I suppose he was vexed, as the few people to whom he had applied for assistance had given evasive answers. I was in hopes that either you or my uncle *Hormuz-jee* would have come forward, but you have no *confidence in us,* which we cannot help. Every thing will be settled on the arrival of the *hoondee.*'

"I wrote to *Munjee-bhaee* as follows :—'These gentlemen have no *confidence in us*; but there was no occasion to put yourself in a rage on that account, for you have no claims against them. Why not take some of our mother's jewels and mortgage them ; they would have been afterwards redeemed : and if there was any delay in this I would have sent a *hoondee.* The difference of exchange is at present so great that I cannot send one without being a loser. I have some outstanding debts and likewise some trade ; I therefore hoped to have been able to assist you, which I will do when the trade increases ; but how can I, at present, with only 25 or 30,000 rupees.' I have mentioned this to you, knowing you to be my friend. You should assist my brother in any difficulty ; or if you could not, you might request some friend to come forward, as we are unknown in *Surat.* I thank you, however, for what you have done, and you no doubt will continue to act considerately. *Hormuz-jee* used to say 'there is no difference between us :' I now, however, find his actions are in contradiction to his fine professions of friendship. If there had been any *difference between us,* he ought to have requested some other person's assistance. We love our character too much to have deceived him : if we had no regard for that, there was no use coming here and undergoing so much fatigue and vexation. A piece of dry bread and a good name is more enviable than riches with a degraded character : it is better for a man to eat poison than live with a bad name. You must pardon me for what I have written about this, and attribute it to my ignorance. I have not mentioned the above either to *Hormuz-jee* or *Munjee-bhaee.* You will deliver the enclosed letter to my uncle.

---

* Bill of exchange.

"I have informed *Peshtun-jee* of our circumstances, and made him acquainted with our concerns with *Bhookhun,* according to your advice. You must settle our dispute. *Munjee-bhaee* mentions your wish to see some accounts of *Sumvit* 1841 : there was no occasion

1836.

SORAB-JEE VACHA GANDA *v.* KOONWUR-JEE MANIK-JEE.

to ask him for them, as you have full powers to do as you think proper. We have a large demand against our uncle concerning *Nunnoo Meya,* our paternal grandfather, and *Byram-jee Sookhya,* which, if paid, will be sufficient, without examining the other accounts, the amount of which he is not able to pay off.

"Pardon the trouble I have given you, and tell *Munjee-bhaee* to make haste with the remainder of the piece-goods. Sixty *corges* have been purchased, but there is still a great number remaining. Let me know if you have any commissions here.

"Saturday, 8th *Katik-sood* 1860. (*October* 1803.)

"P.S. This is not enclosed to *Munjee-bhaee,* lest he should suspect its contents, but sent with the *malwee's* letter."

Upon the production of this evidence the Court informed the plaintiff that no decree could be passed on his single account-current, but, upon his application, allowed him time to produce further evidence, and witnesses were accordingly produced to prove some of the items stated in his accounts ; their evidence, however, went only to transactions previous to the death of *Vacha Ganda.*

The evidence given in by the appellant in contradiction to that above stated, consisted of the respondent's uncancelled promissory note or acceptance for the 13,000 rupees, and the following letter from the respondent in *Surat* to the appellant in *Bombay.*

"It is a long time since you wrote to me ; I therefore expect a letter soon. Understanding that a raffle of some jewellery is now going on in *Bombay,* and as your uncle *Hormuz-jee* and *Dea-bhaee* have procured tickets, the price of which I hear is rupees 100, I request you will procure me one, in the name of *Hormuzdiar Hor-*

muz-jee. Let it be an odd number, and write, me when you have taken it, and I will send you the rupees 100. Don't think of the quarrel with your uncle; please God a release will be drawn out after the *dewallie.** *Munjee-bhaee* wrote to you about the *Mocha* business, with which I suppose you are well acquainted. If you have any commands here let me know. What further can I represent ?

" Monday, 11th *Assin-vud* 1860.

" To *Sorab-jee,* son of *Vacha Ganda.*"

The evidence adduced by *Munjee-bhaee* consisted of the following written memorandum made by two parsee merchants, who being at *Bombay,* out of the jurisdiction of the Zillah Court of *Surat,* made an affidavit identifying the memorandum, before a magistrate at *Bombay.*

" We, parsee *Rustom-jee Jamset-jee,* and *Jamnadas Tookoy-das,* do hereby acknowledge and declare that, at the desire of *Modee Munjee-bhaee Vacha Ganda,* we were at parsee *Koonwur-jee Manik-jee's,* in order to ask and require from him the books of account left with him by *Munjee-bhaee* and *Mehta Wrybhookun,* for the comparison of the accounts from the *Gentoo* years 1856 to 1861; when *Koonwur-jee* answered, that he had not examined the accounts yet : 'your books are in safety, and now I have some business at my master's for a day or two, wherefore you may come tomorrow.' Afterwards again, by the desire of *Modee Munjee-bhaee,* we went twice, when *Koonwur-jee* said, 'You must not come to my house ; we parties will settle amongst ourselves ;' wherefore this conversation we have communicated to *Munjee-bhaee.*

---

* A Hindu festival in November, which is the commencement of the commercial year among the Mahrattas.

Besides, *Modee Munjee-bhaee* desired of us a written memorandum of the conversation we so had with *Koonwur-jee,* because not knowing what is to happen hereafter, and in compliance thereto we have hereby given the same in writing. Dated in the *Gentoo* year 1861 *Assin-vud* 30th, Tuesday.

(Signed) "*Rustom-jee Jamset-jee.*
"*Shah Jamna-das Tookoy-das.*"

On the 24th *May* 1815, the Zillah Court, after reading the plaint, answers, reply, and rejoinders, examining the account-books of plaintiff, hearing the evidences of the witnesses, perusing the documents exhibited, and maturely deliberating on the whole,—

Decreed, That defendants do pay the sum of rupees 7,132. 1. 60., being the amount, principal and interest, according to the *dufters** of plaintiff, of an account-current in the name of *Vacha Ganda,* their father, up to the year 1862. No interest was allowed after that year, as plaintiff did not appear to have exerted himself about the recovery of his money, and suffered defendants to leave *Surat* without preferring a complaint against them. Defendants to pay the fees of the authorized vakeels, and costs, according to the schedule annexed.

Against this decree both parties appealed to the Provincial Court at *Surat* : the now respondent, because he ought to have been allowed interest on the alleged balance of rupees 7,132. lq. 60r.; and the present appellant and *Munjee-bhaee,* because the decree was wrong in allowing any part of the claim whatsoever.

The appeal of the respondent was entered on the file of the Provincial Court as No. 421; that of the appellant and his brother as No. 424.

---

* Account-books.

1836.

SORAB-JEE VACHA GANDA *v.* KOONWUR-JEE MANIK-JEE.

No. 421 came on first. In that appeal, the Provincial Court, having previously had transmitted to it from the Zillah Court of *Surat,* the proceedings of that Court in a suit brought by *Peshtun-jee* against the appellant and *Munjee-bhaee,* on a mortgage bond for 10,000 rupees, executed in the family name of *Vacha Ganda* by *Peshtun Koorshed-jee,* as attorney for *Munjee-bhaee,* made a decree on the 10th *November* 1815, in which, after observing, that the suit was originally filed for the balance of an account-current with *Vacha Ganda,* father of the defendant, the appellant, and *Munjee-bhaee,* closed in 1862; principal, rupees 7,132. 1. 60. and interest, amounting in the whole to 13,689. 0. 75. from which the plaintiff (the respondent) deducted, to the credit of the defendant, the acceptance of *Hormuzjee,* to the amount of 2,000 rupees, and interest thereon, leaving balance claimed 9,493. 1. 69.; that the defendants not only denied the debt, but also that any such acceptance was ever given; and that the last plea was first inquired of, and, on the testimony of *Hormuzjee* himself, that he accepted an order to pay plaintiff, but that the money was still in his hands, owing to a subsequent prohibition from defendant to disburse the amount to the plaintiff, is admitted; that sundry witnesses were then called to prove sundry entries in the plaintiff's books; went on to say, "When it is considered how impossible it must, generally speaking, be to prove a merchant's accounts by oral testimony, it will appear quite unnecessary, in this record, to go through the detail of their evidence. Thus much, however, appears : that the accounts were never regularly compared and adjusted between the parties; that the plaintiff on one occasion put off, on the pretext of other business, the examination which defendant (*Mun-*

1836.

SORAB-JEE VACHA GANDA *v.* KOONWUR-JEE MANIK-JEE.

jee-bhaee) had prepared to make, having carried his books to plaintiff's house for that purpose. These were also left with plaintiff, and when he was applied to for their surrender he evaded compliance. Again, it must be observed, that nothing appears to impugn the correctness of the plaintiff's account, and upon the face of it judgment went for plaintiff to the amount of the balance of principal only, interest being disallowed on the ground of plaintiff's silence in regard to his claim for a period of seven years, (namely, from *Sumvit* 1862 to the month of *Chyte-sood* 6th 1869, A.D. 6th *April* 1813,) during the greater part at least of which time the defendants (appellant and *Munjee-bhaee*) were residing in business at *Surat*. The appeal was instituted to recover that amount of interest, the debt being for moneys advanced, on which the plaintiff had to pay interest himself, and that there was a further claim got up to interest on the amount of the decree, from the date of filing the suit in 1813, *April* 6th. The respondents answered separately, and at length. The sum of all is, that they deny the principal debt, and consequently the appellant's claim to interest thereon, and that they would have appealed against the judgment themselves, but were at a loss for the prescribed securities, and in the meantime were forestalled by the appellant."

The Court did not think fit to enter into the respondent's pleas in bar of the judgment, because they had filed a separate appeal (No. 424) against the same decree, which would afford occasion for investigating the merits of the question at large, the present appeal being confined to interest, which, admitting the principal to be due, there was no discretion in the Court to disallow.

It was therefore adjudged by the Court that the respondents (the now appellant and *Munjee-bhaee*) do pay the amount of interest disallowed by the decree of the Zillah Judge, being rupees 2,361. 0. 09., simple interest, and also rupees 1,690. 1. 37., being the interest on the principal sum of rupees 7,132. 1. 60., from the 6th *April* 1813, on which day the original suit was filed in the Adawlut, up to this day; and further, the sum of rupees 48, being the amount of costs disallowed in the Zillah Court.

The appeal No. 424, which was prosecuted by the appellant alone, *Munjee-bhaee* being unable from poverty to pay the fees of Court, was heard on the 23rd *July* 1816; when the Provincial Court, upon the same evidence which was before the Zillah Court, after observing that *Vacha Ganda,* the father of the appellant, was an inhabitant of *Surat,* but about the *Hindoo* year 1846 or 1847 went to reside at *Bombay,* and traded there until about 1856, when, his mind being in a diseased state, the family came to *Surat,* and his affairs were afterwards carried on in his name by his eldest son; that "*Munjee-bhaee Vacha Ganda* died in 1857, and the affairs of the family continued to be carried on precisely as before his death by the eldest son, in the father's name, (and it is not at all pretended that he did not leave much more property than the amount of this suit,) until 1862, when the respondent closed his accounts with that firm; that the appellant acknowledged his responsibility until his father's death, and had no proof whatever of any separation of his interests after that date; (and it was on this point exclusively that the appeal turned;)—the Court not finding any proof, or even any reason to believe that any separation of *Soorab-jee's* interest took place before 1862, affirmed the Zillah Judge's decree, with interest from 10th *November* last to the date of the decree, at twelve per cent., and costs, against appellant.''

The appellant and his brother appealed from both these decrees, of the 10th *November* 1815 and the 23rd *July* 1816, to the Sudder Adawlut at *Bombay*.

In the meantime the respondent, finding, from the appellant and *Munjee-bhaee's* answers, that they both denied having given any direction to *Hormuz-jee* to give his acceptance for 2,125 rupees, which the respondent had deducted in his original claim, filed a fresh suit against the appellant and his brother for 2,125 rupees and interest. The appellant alone appeared and defended this suit. The only witness called by the appellant was *Hormuz-jee,* who deposed that he had paid no part of the 2,125 rupees to the respondent. The Court, after referring to the *dufter* of the respondent filed in the former suit, together with the proceedings there and in the Court of Appeal, by its judgment, dated the 26th *March* 1817, decreed the appellant and his brother to pay the 2,125 rupees, together with an equal amount of interest, making altogether 4,250 rupees, and also to pay the respondent all his costs except those of his rejoinder.

The appellant appealed from this decree to the Provincial Court, who confirmed the same by their decree of the 14th *April* 1818, with interest at twelve per cent. from the date of the Zillah Judge's decree, and costs. From this decree the appellant again appealed to the Sudder Adawlut at *Bombay*.

The appeals of the appellant and *Munjee-bhaee* from the decrees of the Provincial Court in the first suit, were heard together by the Sudder Adawlut on the

25th *March* 1818. The appellant had, in the course of the proceedings there, put in as evidence the respondent's answer in a suit instituted by the appellant in the Zillah Court, for recovering his share of the 13,000 rupees previously mentioned, in which the respondent acknowledged that he had lent 250 rupees to the appellant, but which he had never charged in his account with *Vacha Ganda,* as he would have done had the appellant been a partner in that house.

The decree of the Sudder Adawlut is dated the 25th *March* 1818, and the chief reasons assigned for the judgment were thus stated : "That it appeared, upon an examination of the documents filed in the case, that the accounts between the parties were never regularly compared and adjusted, but that *Koonwur-jee* on one occasion put off, on pretence of other business, the examination which *Munjee-bhaee* prepared to make, having carried his books to the respondent's house for that purpose. Nothing however had transpired to impugn the correctness of the respondent's account; and upon the face of it judgment had been given in his favour for the principal amount by the *Surat* Adawlut, and affirmed with interest by the Court of Appeal. The account appears to have commenced in the lifetime of the father of the appellants, who, or his death, took possession of his property, and of course became responsible for his debts. The account was afterwards continued in the name of the father, and the sons have not proved any division of the family property and separation of the family, or assigned any good reason why one only of them should be responsible, while the probability is that the other is now in possession of most of the property of the father. The account commenced with the father and continued

1836.

SORAB-JEE VACHA GANDA *v.* KOONWUR-JEE MANIK-JEE.

with the children; and the sons, as heirs to the father, must be considered jointly and severally responsible for whatever property of the father came into their hands, or their acquirements in trade from it. The respondent has satisfied the lower Courts respecting the different items composing the account, and the amount of the balance actually due, and the Sudder Adawlut cannot draw any line of distinction between the brothers for the portion which each is to pay, as it does not appear in what proportions they took possession of their father's property. One of these may have been more successful in business than the other, but they appear to have possessed themselves equally of their father's estate, whatever it may have been, and to be equally responsible for the account with the respondent, for they are both equally credited in the sum of 13,000 rupees in part of the said estate.

The Sudder Adawlut, under the circumstances, was therefore of opinion that the decrees of the Court of Appeal at *Surat,* in Cases No. 101 and 114, ought to be affirmed with costs; and as no discretion about interest could be exercised under section xii,* Regulation VII, A.D. 1812, it was therefore to be allowed, provided the same did not exceed the amount principal, as laid down in section iv, Regulation I, A.D. 1814;†

---

* "Sect. xii. If the Sudder Adawlut shall confirm the decree of the Provincial Court, it shall adjudge interest at the rate of one per cent. per mensem, on all sums receivable by the respondent under the decree; and the Sudder Adawlut is authorized to punish appeals which may appear to it to be litigious, by a fine to government, proportionate to the condition of the party and the circumstances of the case."

† "Sect. iv. Where the interest on debts or on money lent may have accumulated so as to exceed the principal money, the Courts of Adawlut shall not decree a greater sum for interest than the amount of such principal money."

and the decrees passed by the Court of Appeal under dates the 10th *November* 1815 and 23rd *July* 1816 were accordingly affirmed with interest and costs.

In the appeal of the appellant from the decree of the Provincial Court of the 23rd *July* 1816, in the second suit, the Sudder Adawlut, on the 12th *May* 1819, affirmed the decree appealed from, with interest and costs.

The appellant presented his petition of appeal to the King in Council against the said several decrees of the Sudder Adawlut of the 25th *March* 1818, and the 12th *May* 1819, and prayed they might be reversed for the following reasons :—

I. Because there not only was no evidence that the appellant ever had any account with the said respondent or was a partner in the house of *Vacha Ganda,* but the presumption it afforded led to a different conclusion.

II. Because, admitting the appellant, as one of the administrators of *Vacha Ganda,* to have been liable to the extent of the assets received from him, yet it appeared, upon the face of the respondent's own alleged accounts, that a balance was due from him to *Vacha Ganda* at the time of *Vacha Ganda's* death, and the appellant ought not to have been held liable for an account kept in his father's name many years after his death, without any proof of the appellant's ever having sanctioned such account.

III. Because the respondent's own books ought not to have been received as decisive evidence in his own favour against the house of *Vacha Ganda,* especially when it had been proved that they had never been balanced or compared with the books of that house during the period in question, which the respondent had actually possessed himself of, and had refused to deliver up when they were demanded of him by *Munjee-bhaee.*

IV. Because the respondent ought not to have been allowed interest on the alleged balance, which consisted chiefly of interest upon supposed annual balances struck by himself, without any evidence of communication with any member of the firm sought to be charged.

The respondent, on the other hand, submitted that the appeal ought to be dismissed, and the decrees of the Sudder Adawlut of *Bombay* affirmed, for the following reason :—

Because the correctness of the respondent's account-current, and the joint liability of the appellant and his brother *Munjee-bhaee* to discharge the balance of that account, were sufficiently established by the evidence.

Mr. *Miller,* K.C., and Mr. *Wigram,* K.C., for the appellant.

Mr. Serjeant *Spankie,* and Mr. *Lloyd,* for the respondent.

The VICE-CHANCELLOR (Sir Lancelot Shadwell).

On the 6th *April* 1813, *Koonwur-jee Manik-jee,* the respondent in this appeal, brought his plaint in the Zillah Court of *Surat* against *Munjee-bhaee* and the respondent *Sorab-jee,* alleging that they had dealings with him; that their account-current was regularly adjusted by their *gomashtahs* up to 1860, and that on the 9th *Poos-sood* 1862 there was a balance in the respondent's favour of rupees 7,132. 1. 60. This claim against the defendants was for that sum, principal and interest, equal in the whole to rupees 13,689. 0. 75., from which he deducted rupees 2,125 principal and

1836.

SORAB-JEE VACHA GANDA *v.* KOONWUR-JEE MANIK-JEE.

rupees 2,070. 3. 6. interest, making rupees 4,195. 3. 6., on the acceptance of *Hormuz-jee Bheem-jee,* who, it was alleged, had not paid the plaintiff a rea, leaving a balance against the defendants of rupees 9,493. 19. 69.

The defendants answered separately. The appellant denied having settled accounts with the plaintiff's *gomashtah.*

In support of his case the respondent produced an extract from his own accounts. Two letters were also put in evidence, and some witnesses were examined. The inference from the letters rather was, that there had been separate transactions between the respondent and the appellant. But there was no evidence to show that the appellant was privy to the respondent's accounts. The Zillah Court, however, on the 24th *May* 1815, decreed that the defendants should pay to the plaintiff the sum of rupees 7,132. 1. 60., the amount of the principal sum claimed, according to the *dufters* of the plaintiff ; but refused to decree interest thereon, on account of the plaintiff's having laid by for seven years without prosecuting his demand.

The respondent, on the 17th *October* 1815, brought another plaint in the Zillah Court against *Munjee-bhaee* and the appellant, to recover the 2,125 rupees, and interest, on account of the acceptance of *Hormuz-jee ;* and on the 26th *March* 1817, the Court decreed that the defendants should pay to the respondent the 2,125 rupees, and interest.

The only evidence in that suit was, that it appeared by the evidence of *Hormuz-jee,* and the plaintiff's dufters in the former suit, that the 2,125 rupees had not been paid to the plaintiff : no additional evidence was offered to show that the defendants could be bound by the plaintiff's accounts.

The respondent appealed to the Provincial Court against the decree of the 24th *May* 1815, because interest had not been allowed him on the sum recovered, and the Provincial Court, on the 10th *November* 1815, decreed the appellant and *Munjee-bhaee* to pay the interest which had been disallowed by the Zillah Court, and the costs of the appeal.

The appellant appealed to the Provincial Court from the decree of the 24th *May* 1815; but on the 23rd *July* 1816, the Provincial Court affirmed the decree.

The appellant also appealed to the Provincial Court from the decree of the 26th *March* 1817; but on the 14th *April* 1818 the Provincial Court affirmed it.

Upon three distinct appeals to the Court of Sudder Dewanny Adawlut, in two of which *Sorab-jee* was sole appellant, and in the third, he and *Munjee-bhaee* were joint appellants from the three decrees of the Provincial Court,—those decrees were affirmed with costs by these decrees; two of the 25th *March* 1818, and one of the 12th *May* 1819. The appellant, *Sorab-jee,* has presented his appeal to His Majesty in Council against those decrees of the Sudder Dewanny Adawlut. It is observable, that if the first decree of the Zillah Court were right, its second decree might be right also, for the claim for the sum of 2,125 rupees, and interest, rested on the same ground as the claim by the first plaint; and if those decrees were right, the decree of the Provincial Court upon the appeal of *Koonwur-jee Manik-jee,* for the interest disallowed by the Zillah Court, might be right also; but if the decree of the Zillah Court upon the first plaint was wrong, then that plaint, as well as the plaint in the second suit in the Zillah Court, and the appeal of *Koonwur-jee Ma-*

1836.

SORAB-JEE VACHA GANDA *v.* KOONWUR-JEE MANIK-JEE.

nik-jee to the Provincial Court, should have been dismissed with costs.

No evidence was brought before the Provincial Court, or the Court of the Sudder Dewanny Adawlut, which was not before the Zillah Court, so that the decrees can only be supported by holding that one party producing his own books of account can bind the other. But such a proposition is utterly untenable, and the result is that all the eight decrees of the Sudder Dewanny Adawlut Court are wrong; that the three decrees complained of must be reversed as to the appellant, but without costs ; and the decrees of the Provincial and Zillah Court be reversed so far as they direct the appellant, *Sorab-jee,* to pay principal, interest, or costs. But the two original plaints in the Zillah Court, and the respondent's appeal to the Provincial Court, must, as against the appellant, *Sorab-jee,* be dismissed with costs.

JANNOKEE DOSS - - - - *Appellant,*

v.

THE KING, at the Prosecution of BINDABUN DOSS. - - - - } *Respondent.**

On appeal from the Supreme Court of Judicature at Fort William in Bengal.

HEARD EX PARTE.

Jurisdiction—Criminal Court—Accused resident at Benares—Complicity in offence of conspiracy committed in Calcutta—Jurisdiction of the supreme Court at Calcutta.

Under the general jurisdiction of the Supreme Court at *Calcutta*, a person though resident at *Benares* is liable to its jurisdiction, if privy to and co-operating in a misdemeanor committed within it.

Where, therefore, a party resident at Benares was indicted with others before the Supreme Court for a conspiracy, in procuring the prosecutor to be arrested in a fictitious action at law, and the instructions for the arrest were proved, to the satisfaction of the jury, to have originated with the appellant, it was held by the Judicial Committee that the offence being completed within the jurisdiction of the Supreme Court at *Calcutta*, that Court had rightly assumed jurisdiction over the parties privy to it; though, from the slight nature of the evidence, they directed a new trial.

THE appellant, who was a native of *Benares*, in the district of *Benares*, in the *East Indies*, was, in the month of *August* 1829, tried at *Calcutta* before the Supreme Court of Judicature, upon an indictment, wherein he and one *Ramchunder Day*, and four other persons, (all natives of India, but all of them, except the appellant, persons resident in *Calcutta*,) were charged with having unlawfully conspired to procure the imprisonment, or detention in prison, of *Bindabun Doss*, the prosecutor, (also a native of *India*,) by falsely and maliciously causing an *action at law* to be brought against him by and in the name of the said *Ramachander Day*, for the recovery of a sum of money falsely alleged to be due to the latter. 11 December 1836.

---

* Present : Lord Brougham, the Vice-Chancellor, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy, and Sir Alexander Johnston.

1836.

JANNOKEE DOSS *v.* BINDABUN DOSS.

The appellant had always, from the time of his birth, resided in *Benares,* his native place, and until after the trial of this indictment, he had never been to *Calcutta,* or to any place within several hundred miles of *Calcutta.*

On the 6th *August* 1829, the trial of the appellant was ordered to proceed in his absence, he being unable to leave his house at *Benares* by reason of ill health.

At such trial three of the defendants, *Ramchunder Day, Hullodhur Doss,* and *Cossinanth Doss,* forfeited their recognizances for want of appearance;—against the other three defendants, the appellant, *Juggernauth Sing,* and *Assah Sing,* the jury returned a verdict of guilty.

The evidence in support of the prosecution consisted of certain exhibits, being the proceedings in the said action against the prosecutor, and of the parole evidence of eight witnesses.

The evidence of the six first witnesses did not in the slightest degree tend to implicate the appellant in the alleged conspiracy.

The seventh witness for the prosecution was one *Gunnesh Bhutt,* who stated, that in the month of *Choyt,*[*] the appellant and himself were residing at *Benares* : that one day (but on what day the witness could not recollect) he was going from his own house to the house of one *Hurrackchund,* who lived in *Benares* and near the prosecutor's, when the appellant called out to him, and addressed him in the following terms : "Your baboo or master," (meaning the prosecutor,) "is going to Cal-

---

[*] This month answers to our months of *March* and *April,* commencing about the middle of *March* and ending about the middle of *April.*

cutta; what is the use of his going? Let him take 20,000 rupees, and give a *ruffanama*."*

This witness, in his cross-examination, admitted that he was then in the service and pay of the prosecutor; that he had been in such service and pay for seventeen years; and that he had been attached to the prosecutor from the time when he was twelve or fourteen years of age.

The eighth and last witness for the prosecution was one *Munkuram Doss*; he described himself as being a *gomashtah* or agent to merchants; that he had known the appellant twenty-five years; that he remembered the circumstance of the prosecutor's being arrested; (this arrest took place in or about the latter end of *July* or beginning of *August* 1828;) that he, the witness, saw the appellant about that time; that he was passing along; that the appellant was at a window of his house; that the appellant called him, the witness, and said, "I hear you are going to *Calcutta* with *Bindabun*; do not go; if you do go you will be put to trouble for nothing, and will reap no benefit. He is going from here in custody; other complaints may then be made, and he will not get his liberty. Enter into my service, and I will give you good wages."

The witness then proceeded to state, that he refused such offer; that before this time the prosecutor had asked him to go to *Calcutta*, and that he, the witness, had agreed so to do. The appellant showed me (added the witness) a letter, and said, "Very well; here is a letter informing me that when he gets down other complaints will be preferred against him." The appellant (continued the same witness) said, "I have also written to *Calcutta*, directing that when he reaches he shall not obtain his liberty."

---

* Deed of compromise.

This witness, in his cross-examination, said, "I used occasionally to call at the *Cottee,*—no one else was with me; *Jannokee* (the appellant) was sitting up stairs; I went up to him; there were a number at the gate, not up stairs where he was; I don't know the names, peons, and servants, and so forth. He never before called me in that manner; I had been occasionally there before. *Bindabun* had then been arrested seven or eight days; I had not entered into his employ before he came down to *Calcutta*; one day when I went to him, previously to his being arrested, he asked me if I was willing to go down to *Calcutta* on his behalf. I was aware of the mode of conducting business in the native Court, not in this Court. The object was to send me down to Mr. *Goldsworthy,* (the prosecutor's attorney,) and to have me with Mr. *Goldsworthy* when *Bindabun* went to gaol."

Upon this evidence the appellant was found guilty.

On the 26th *October* 1829, the appellant moved for a new trial; and by his affidavit stated that he had never, until after the time of such conviction, quitted *Benares* since his birth; that in *August* 1826, he employed the said *Juggernauth Sing* to act as his agent in *Calcutta* in the general management of his affairs there; that being ignorant of the law of *England,* and of the form of proceeding in the Supreme Court at *Calcutta,* he had always entrusted the care and management of all such legal proceedings in that Court as he might be interested in to an agent; that *Juggernauth Sing,* as such agent, had employed several solicitors on the appellant's behalf, and had even changed such solicitors without having previously communicated with the appellant upon the subject.

That in *March* 1828, a native writer, whom he had

1836.

JANNOKEE DOSS *v.* BINDABUN DOSS

never before seen, and with whom he was wholly unacquainted arrived at *Benares* with a letter from *Juggernauth Sing*, stating the bearer had come to *Benares* for the purpose of serving some summonses or subpoenas upon the prosecutor, and requesting appellant to cause the same to be served accordingly; and that in consequence of such request, he ordered one of his servants to accompany the said native writer, and point out to him the person of the prosecutor; and that in *May* 1828, he received another letter from *Juggernauth Sing*, informing him that a writ of attachment had been issued against the prosecutor, and requiring him, the appellant, to assist in executing the same; and that he therefore, in the performance of what he considered his duty, directed one of his servants to point out to the officer who had the charge of such writ the person of the prosecutor.

That he had for many years led a very retired life, and that during the four last years he had not quitted his house more than ten or fifteen times altogether, and that during such period he had not once been absent from his house for more than an hour at a time; and that he had given strict orders (which had been observed) to his door-keepers, during the whole of such period, not to admit any person into his house at *Benares*, until one of such door-keepers (some of whom were always stationed at the gate) should have previously informed him of the name and quality of the party seeking admittance.

That he did not know and was not acquainted with any person called *Gunnesh Bhutt*; and that he never, either in the month of *Choyt*, in the *Bengal* year 1235, or at any other time, conversed or spoke to such last-mentioned person, or to any person called *Munkuram*

1836.
JANNOKEE DOSS *v.* BINDABUN DOSS.

Doss: he denied that he had ever said to the said *Gunnesh Bhutt* that his master, *Bindabun,* was going to *Calcutta,* or that he had ever uttered any words to the like effect; or that he had ever asked the said *Gunnesh Bhutt* what was the use of the said *Bindabun* going to *Calcutta*; or had ever asked any other question to the like effect; or that he had ever proposed or offered, through *Gunnesh Bhutt,* or through any other person or persons, to give the said *Bindabun* 20,000 rupees, or any other sum of money, or that he had ever made any other proposal or offer to that or the like effect; that he had never held any conversation with the said *Gunnesh Bhutt* on the subject of the said *Bindabun,* or of any compromise, or on the subject of the said *Bindabun* and the said *Gunnesh Bhutt,* or either of them, proceeding to *Calcutta*; and that to the best of his belief, he had never conversed with the said *Gunnesh Bhutt* on any subject whatever, and that the said *Gunnesh Bhutt* was entirely unknown to him, and that he never knew that any person of that name had ever been in the service of the prosecutor.

That he was in like manner wholly unacquainted with any person named *Munkuram Doss,* and that he never called or spoke to any person named *Munkuram Doss* from any window or other part of his house; that he never said to the said *Munkuram Doss* that he had heard that the said *Munkuram* was going to *Calcutta* with the prosecutor; that he never said to the said *Munkuram* "Do not go," or any words to the like effect; that he never said to the said *Munkuram,* "that if he went to *Calcutta* he would be put to trouble for nothing, and would reap no benefit," or any words to the like effect; that he did not then, or at any other time, say to the said *Munkuram,* or to any other person, "that the prosecutor was then going from *Benares* in custody, or that other complaints would or might then or thereafter be made, and that the said prosecutor would not get his liberty," or any words to the like effect; that he never asked the said *Munkuram* to enter into his service, or offered to take the said *Munkuram* into his service; that he never offered to give the said *Munkuram* any wages; that he never produced or showed any letter to the said *Munkuram*, or said to him, "Very well, here is a letter informing me that when *Bindabun* gets down, other complaints will be preferred against him," or any words to the like effect; that he never said to the said *Munkuram* that he had written to *Calcutta*, directing that when *Bindabun* reached *Calcutta* he should not obtain his liberty, or any words to the like effect; that he never wrote to any such effect on that or any occasion to any person or persons, either at *Calcutta* or elsewhere, respecting the said *Bindabun*; that he never called to the said *Munkuram* from either of the windows of his house, or asked or desired the said *Munkuram* to come up stairs; and that the said *Munkuram* never came to him, or conversed with him, in any part of his said house; and, to the best of his belief, the said *Munkuram* never was in his house.

That the evidence or testimony which was given by the said *Gunnesh Bhutt*, and *Munkuram Doss*, at the trial of the said indictment, so far as related to the alleged conversations with him respecting the said prosecutor, was utterly false.

That he never entertained any design or intention of causing the said prosecutor to be arrested, or confined, or detained at *Calcutta*, either on the occasion or in the manner in the said indictment stated, or at any other time, or in any other manner; and that he never communicated such intention or design to any person or persons whomsoever.

That he never was informed by any person or persons that any such design was entertained by any person or persons; that he never, directly or indirectly, abetted or encouraged, or counselled, or advised any such design or intention, and that he never was in any manner privy thereto; that he never, directly or indirectly, ordered, counselled, advised, or encouraged the said *Juggernauth Sing, Assah Sing, Ramchunder Day, Hullodhur Doss, and Cossinanth Doss,* or any or either of them, or any person or persons whomsoever, to bring any action or institute any suit against the said prosecutor for recovering or compelling the payment of sicca rupees twelve thousand, or any other sum of money.

That it was wholly unknown to him how, or why, or when, or wherefore, the action stated in the said indictment against the said prosecutor, at the suit of *Ramchunder Day,* was commenced.

That *Bheecom Sing, Chota Ramjeewun, Furzaud Ally, Meer Rajeb Ally,* and *Burra Ramjeewun,* were his door-keepers, and were stationed at the gate of his house at *Benares,* and were all respectively in his service as such door-keepers before and during the whole of the said month of *Choyt,* and at and before and after the time when the said *Bindabun* was arrested at *Benares* under the said writ of attachment.

And the said *Bheecom Sing, Chota Ramjeewun, Furzaud Ally, Meer Rajeb Ally,* and *Burra Ramjeewun,* (the appellant's said door-keepers,) by their affidavit stated, that they had been in the appellant's service, as his door-keepers, for the six last years and

1836.

JANNOKEE DOSS *v.* BINDABUN DOSS.

upwards; and that during such period three of them at the least had always remained stationed at the gate of the appellant's said house. They confirmed the appellant's statement as to his retired mode of life, and the situation of his house and its windows; and stated, that to the best of their belief neither the said *Gunnesh Bhutt* nor *Munkuram Doss* had ever, during the last four years and upwards, entered or called at the appellant's said house, or been addressed from any of its windows; and that if they, the said *Gunnesh Bhutt* and *Munkuram Doss*, or either of them, had so entered, called, or been addressed, they, the said door-keepers, or some of them, must have known it.

Several witnesses swore that bribes had been offered them if they would give evidence upon the trial of the said indictment against the defendants.

The Court refused to grant the appellant a new trial, but gave him leave to appeal to His Majesty in Council.

Under the above circumstances, it was contended, on the part of the appellant, that the indictment against him should be quashed, or that the verdict which has been pronounced against him should be set aside for the following amongst other reasons:—

I. Because the appellant was not a person in any manner subject to the jurisdiction of the Supreme Court, either generally or in a special character, and the indictment averred, as is usual and necessary, to show the jurisdiction of the Court, "That the appellant and the several persons accused, committed the several offences and misdemeanours therein specified, at *Fort William* in *Bengal*, and therefore are persons severally and respectively subject and amenable to the jurisdiction of the said Supreme Court for the said

1836.

JANNOKEE DOSS *v.* BINDABUN DOSS.

offences, &c." Whereas the appellant had not, at the time of the commission of the overt acts of conspiracy stated in the indictment, ever been at *Calcutta,* and that even if the evidence applicable to the appellant had been true, it did not tend to prove the commission of the offence charged upon him at *Calcutta,* so as to render him amenable to the jurisdiction of the Supreme Court for the said offence : and if guilty of the offence charged against him, he was amenable to the jurisdiction of the Criminal Court, established under the British authority at *Benares,* where he resided.

II. Because, supposing the said Court to have had such jurisdiction to try the appellant, the evidence against the appellant was insufficient to warrant the verdict found by the jury.

III. Because, under the circumstances of this accusation, sufficient grounds were laid before the Supreme Court to call upon the said Court to direct a new trial in a case when the verdict and judgment would be so injurious to the character of the appellant.

Mr. Sergeant *Spankie* and Mr. *Tennant* for the appellant.

The Court below exceeded their jurisdiction in taking cognizance of the offence charged against the appellant. The indictment averred that the appellant committed the several offences and misdemeanours therein specified at *Fort William* in *Bengal.* Whereas the appellant, at the time of the alleged commission of the offence, had never been at *Calcutta,* and was resident at *Benares,* without the jurisdiction of the Supreme Court. By the Act 13 *Geo.* III, c. 63, the limits of the

Supreme Court in criminal matters are defined,* and were very fully discussed in Sir *Elijah Impey's* case.†

The indictment against the appellant and the other defendants was for unlawfully conspiring to procure the imprisonment of *Bindabun Doss,* the prosecutor, by falsely and maliciously causing an action at law to be brought against him. The alleged conspiracy is therefore the *gravamen* of the charge, and constitutes the misdemeanour. We admit that it is not necessary to set out the overt acts which constitute the offence; and provided it is completed, and the party committing the overt acts is within the jurisdiction, he is amenable to the Court. But in this case the overt act charged was not committed within the jurisdiction, nor was the party even liable or amenable to it.

Where two persons conspire to do a criminal act, one of whom is resident within the jurisdiction of the Supreme Court at *Calcutta,* but the other not, the party so resident can alone be made liable to the process. The other must be tried for the offence, if it be any, in the country in which he is resident.

A conspiracy is a constructive act, and must be so charged; the publication of a libel, in *Rex* v. *Johnson,*[*] was held to be in *London,* though the letter issued in *Dublin,* and the agent of the defendant, being within the jurisdiction of the Court of King's Bench, was held amenable to that Court. We admit that the question of jurisdiction must turn upon the wording of the charter, but the construction taken by the Court below has never yet been put upon it.

---

* The clause in the charter granted in pursuance of that Act, 26th *March* 1774, is, "And we do hereby grant, ordain, and appoint, that the said Supreme Court of Judicature at Fort *William* in *Bengal* shall be at all times a Court of record, and shall be a Court of oyer and terminer, and gaol delivery, in and for the town of *Calcutta* and factory of *Fort William* in *Bengal*, and the limits thereof, and the factories subordinate thereunto; and shall have like power and authority, as commissioners or justices of oyer and terminer and gaol delivery have or may exercise in that part of *Great Britain* called *England,* to inquire by the oaths of good and sufficient men, of all treasons, murders, and other felonies, forgeries, perjuries, trespasses, and other crimes and misdemeanours, heretofore had, done, or committed, or which shall hereafter be had, done, or committed within the said town or factory, and the limits aforesaid, and the factories subordinate thereto."

† Parl. Hist., vol. xxvi, p. 1335.

The evidence, if admitted to its full weight, is too slender to support a charge of conspiracy. Two only of the witnesses say any thing against the appellant, *Gunnesh Bhutt* and *Munkuram Doss*; the first speaks to a declaration of the appellant, that the prosecutor was going to *Calcutta,* advising him to take 20,000 rupees, and give a *ruffanama,* which is a deed of compromise, and implies that there was an equity suit pending between the parties at the time: while the second witness, *Munkuram Doss,* speaks at most only to the threat of issuing an attachment. How can that be construed into a conspiracy? It is of every-day occurrence. It is impossible to draw an inference of criminality from such testimony. The whole evidence is mere inference from supposed conversations: no single act is shown to have been done either by or at the instance of the appellant.

The Court below, in refusing a new trial, acted on a misconception of the rule laid down in *The King* v. *Lord Cochrane,*[†] *where* it was held, that in moving for a new trial, all the defendants ought to appear, to prevent the possibility of collusion.

The Attorney-General (Sir *John Campbell*) and Mr. *Wightman,* for the Crown,

---

[*] 7 East, 65.

[†] 3 Maul & Selwyn, 10 n.

1836.

JANNOKEE DOSS *v.* BINDABUN DOSS.

Admitted that the evidence was very slight, but contended that if the appellant was guilty of a conspiracy at all, he was guilty in *Calcutta,* though, as he could not anticipate the evidence that was given against him, and could not be prepared to contradict it, he ought on that account to have had the benefit of a new trial.

Mr. Justice BOSANQUET :

7 December.

The appellant in this case, having been convicted upon an indictment for conspiring, with others at *Calcutta,* wrongfully to cause the prosecutor to be arrested and imprisoned without reasonable or probable cause, applied to the Supreme Court for a new trial, which was refused; but the Court, pursuant to the 17th section of the charter of the 26th *March* 1774, gave him leave to appeal from that refusal to His Majesty in Council. Upon the hearing of this appeal three points were made :—

First, That the caption of the indictment was defective, for want of stating that the indictment had been found by twelve jurors.

Second, That as the appellant, a native of *Benares,* had never been in *Calcutta,* and was actually resident at *Benares* when the offence was committed, he was not subject to the jurisdiction of the Supreme Court. And,

Third, That the evidence given at the trial was insufficient to support the conviction, or, at least, that upon the weakness of that evidence, and the affidavits adduced in contradiction to it, the appellant was entitled to a new trial.

The first of these points is not a matter for consideration upon this occasion, which is an appeal from

1836.

JANNOKEE DOSS *v.* BINDABUN DOSS.

a refusal of the Court below to grant a new trial. No motion in arrest of judgment was made in the Supreme Court, and no judgment has been given. If the appellant should be called upon to receive judgment, he may, if advised, move to arrest the judgment, and the Court will deal with that motion as may be thought fit. The second point, respecting the jurisdiction of the Court, is involved in the question, whether the charge of the appellant having, in *Calcutta,* conspired with others, for the purpose stated in the indictment, was sufficiently proved. The offence with which the appellant is charged is a misdemeanour; and if he, though resident at *Benares,* was privy to, and persevered and co-operated in, a conspiracy with others, who were in *Calcutta,* to cause the prosecutor to be wrongfully arrested there, he was guilty of that misdemeanour, and was chargeable with having committed it in *Calcutta,* under the general jurisdiction of the Supreme Court over all persons who commit offences there.

This very point was lately decided in this place, upon an appeal from *Bombay,* in the case *Pooneakhoty Moodeliar,*[*] who was indicted for uttering a forged receipt in *Bombay,* which, by the 53rd *Geo.* III, c. 155, s. 115, is made a misdemeanour. He was, at the time when the offence was committed, at a great distance from *Bombay.*

Two questions were argued with respect to the jurisdiction; first, whether the defendant was subject to the general and local jurisdiction of the Court; and, second, if not, whether he was subject to the personal jurisdiction in respect of his service rendered to the East India Company. The second ground was not relied on by the Advocate-General in the Court below,

---

[*] 22nd May 1835.

1836.

JANNOKEE DOSS *v.* JINDABUN DOSS.

who had professedly put the case upon the first ground; and the judicial committee thought it quite unnecessary to pronounce any opinion upon the second ground, being of opinion that the fact of the case established the point, that the offence charged in the indictment was committed in *Bombay.*

After examining the evidence at considerable length, the committee expressed their opinion that the jury were warranted in finding that *Pooneakhoty* was privy to the transactions, and consequently was a participator in the misdemeanour. The question therefore arises, whether, being a participator in this misdemeanour, he could be charged with having committed the offence in *Bombay.* Now it has been repeatedly decided, that where a misdemeanour is completed, the offence may be charged to have been committed. A variety of authorities may be found upon the subject; several of them are cases when the jurisdictions within which the different parts of the transaction occurred, were of totally different kinds; notwithstanding which the indictment has been supported in the place where the offence has been laid, such being the place in which the misdemeanour was completed. There are cases of nuisance, of libel, of fraud, of cheat, and of conspiracy. The authorities referred to were *Hawkins* P. C., book ii, c. 25, s. 47; *Rex* v. *Johnson,* 7 *East* 65; *Rex* v. *Brissac,* 4 *East,* 164; *Rex.* v. *Coombes,* 1 *East,* P. C., c. 5, s. 131; 1 *Leach* Cro. Cas., 432. Supposing therefore it was said to be of an ordinary person, whether a native of the provinces, or a Portuguese, or any other foreigner, and to have proved the offence to be committed, there is no doubt he would, on the authority of these, have been liable to be prosecuted for the statute misdemeanour completed in *Bombay,* as a person

1836.

JANNOKEE DOSS *v.* BINDABUN DOSS.

subject to the general jurisdiction of the Recorder's Court. It was further suggested, however, in that case, that the defendant was not subject at all to the jurisdiction of the Court of the British Government, because he was resident out of the British rule and within the dominions of the Nabob of *Arcot,* an independent prince; but whether he was or was not in the service of the East India Company, he was subject to the personal jurisdiction of the Court, as it was said to be clear that he was employed in the care of the British forces then engaged in the Dewanny, under the authority of the British Governor, though in the dominions of a native prince; he was therefore under the protection of the British laws, and consequently owed obedience to them, according to the well-drawn maxim of law, "*Protectio trahit subjectionem et subjectio trahit protectionem,*" and having been guilty of an offence, which was committed by his procurement within the local limit of *Bombay,* he was indictable there as much as if he had been personally within the limits of the law, as in the case present, or that where Judge *Johnson* was held indictable in *Middlesex,* though he was never out of *Ireland.* In the present case, it is sufficient to say, that the appellant was resident at *Benares,* which is in the British possessions in *India,* and was consequently liable to be indicted in the Supreme Court for an offence committed in *Calcutta,* in respect of which the British law subjects all offenders to be indicted there.

The remaining question to be considered is whether satisfactory proof has been given of the appellant's participation in the offence. It appears by the evidence of the prosecutor Bindabun Doss that in the month of *August* (which corresponds to *Strabun*) in the year 1828, the appellant was brought to *Calcutta* upon an attachment issued upon a cross bill against him filed in the name of the appellant; that a person named *Juggernauth,* one of the defendants, was the appellant's agent at *Calcutta,* and that he, together with other defendants then in *Calcutta,* conspired to procure *Bindabun's* imprisonment and detention, by means of a fabricated document purporting to acknowledge a debt of 12,000 rupees due from *Bindabun* to one *Ramachunder,* another defendant, who had absconded. The indictment was found in *December* 1828 : in *March* or *April* following, four months before the trial, that is in the month of *Choyt* 1829, *Bindabun* came from *Benares* on account of this indictment and did not return to *Benares* before the trial, which took place in *August* 1829. To prove the appellant's connexion with this transaction in *Calcutta,* two witnesses were called,—*Munkuram Doss,* the eighth witness, who says that about the time of *Bindabun's* arrest, *Jannokee* called to him from the window of his *cootee,* and the witness then went up stairs, where *Jannokee* said " I hear you are going to *Calcutta* with *Bindabun.*" I said " Yes." He said, " Do not go; if you do go you will be put to trouble for nothing, he is going from here in custody; other complaints may then be made, and he will not get his liberty." That *Jannokee* showed him a letter, and said, "Here is a letter, informing me that when he gets to *Calcutta* other complaints will be preferred against him ;" and *Jannokee* said, "I have also written to *Calcutta,* directing that when he reaches he shall not obtain his liberty." *Gunnesh Bhutt,* the seventh witness, says that the entered *Bindabun's* service last *Choyt,* which was *March* or *April* : *Jannokee* called to him and said, "Your *Baboo* is going to *Calcutta,* what is the use of his going ? let him take 20,000 rupees, and give a *ruffanama.*" *Bindabun* was then coming for this case pending at the sessions about the 12,000 rupees : he says, " *Bindabun* did give an answer, but the witness did not communicate it to *Jannokee.*"

If full credence be given to these two witnesses, their testimony certainly affords evidence, from which the appellant's privity to some attempt to procure the respondent's detention at Calcutta, and a desire to compromise the matter after the indictment had been found, may be inferred. But it is to be observed that these witnesses speak to conversations only, obviously liable to be misinterpreted as well as misrepresented; and it was scarcely possible that the appellant could anticipate the testimony to be adduced against him, so as to be prepared at the trial either to explain or contradict it by witnesses on his part. No evidence was adduced, on the part of the prosecution, of his having done any act to promote the success of the particular fraud attempted. On his part he has, by his affidavit, not only denied all knowledge of the transaction, but all conversation with either of the witnesses, and all acquaintance with them ; and the great improbability of their account is corroborated by the affidavits of several persons. An application to set aside a verdict of conviction, founded on affidavits made after the trial is always to be looked upon with very great jealousy. But when the evidence without contradiction is of so slight a nature as it is in this case, and the appellant could not be expected to offer evidence in opposition to it, for want of knowledge that it would be adduced against him, their lordships are of opinion that an opportunity ought to be afforded him of laying before a jury such evidence in his defence as he may be able to offer upon another trial.

Lord BROUGHAM :

No observation arises except upon the conduct of the party or parties in respect of delay in this case. It is now towards the end of 1836, and the proceeding in question was five or six years ago. We have made particular inquiry as to the course the proceedings took here, in order to ascertain to what party this delay is imputable. It appears that the prosecutor never made any appearance at all : it was therefore necessary for the defendant, in order to force on the case after having lodged his appeal, to take the usual steps by summons, of which two are served; first a summons of two months, and then a peremptory summons of six weeks. Until the six weeks of the peremptory summons had expired, it was impossible for him to proceed, and for the cause to be set down *ex parte*. Before the cause can be set down *ex parte*, it is necessary that the Court should be satisfied of the fact of the two summonses having been served. The affidavit to satisfy the Court of two summonses having been served, was not made till *November* 1835; then, for the first time, was the case ripe for hearing, owing to the prosecutor not having appeared, and owing (if there was any delay) to the defendant not having previously issued the peremptory summons, and made the proper affidavits of service. After having satisfied the Court of the issue and service of those summonses, and the prosecutor not appearing, the case became, for the first time, ripe for hearing. Then it was for the only party before the Court, namely, the defendant, to

1836.
JANNOKEE DOSS v. BINDABUN DOSS.

have urged on the hearing, if he had so thought fit; for at any time between *November* in the last year and the present time, the case was ripe and might have been heard. No application however was made for a hearing; the defendant was satisfied that the case should take the course of the paper. The Court, of course, could not, without any solicitation or any application, take any step for bringing on the hearing out of the usual course. If there has been delay, therefore, it has been partly from the default of the prosecutor, and partly from the defendant not taking the steps he might have taken to obtain a more speedy hearing.

JAMES YOUNG, and others - - - *Appellants,*

v.

The BANK of BENGAL - - - *Respondent.**

On Appeal from the Supreme Court of Bengal.

Insolvents Act (1829), 9 *Geo.* IV, *c.* 73, *S.* 36—*Mutual credit—Meaning of—Set off—Right of creditor of Insolvent to Conditions.*

Palmer and Co. having borrowed a large sum of the Bank of *Bengal*, deposited Company's paper with the bank to a greater amount, as a collateral security, accompanied with a written agreement, authorizing the bank, in default of repayment of the loan by a given day, "to sell the Company's paper for the reimbursement of the bank, rendering to *Palmer* and Co. any surplus." Before default was made in the repayment of the loan, *Palmer* and Co. were declared insolvent, under the Indian Insolvent Act, 9 *Geo.* IV, c. 73, by the thirty-sixth section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other; and that all such debts as might be proved under a commission of bankruptcy in *England*, might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of *Palmer* and Co., which they had discounted for them before the transaction of the loan, and the agreement as to the deposit of the Company's paper. The time for repayment of the loan having expired, the bank sold the Company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of *Palmer* and Co., against the bank, to recover the amount of this surplus, *Held* that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act.

THIS was an appeal from a judgment given on the 26th *March* 1833, in a cause in the Supreme Court of Judicature at *Fort William*, in *Bengal*, in which the appellants were plaintiffs and the respondents defendants. 2 December 1836.

The appellants were the assignees of the estate and effects of *John Palmer, George Alexander Prinsep, William Prinsep,* and *Charles Barber Palmer,* lately trading in *Calcutta,* in the province of *Bengal,* in the

---

* Present : Lord Brougham, the Vice-Chancellor, Mr. Baron Parke, Mr. Justice Bosanquet, Sir E. H. East, and Sir A. Johnston.

East Indies, under the style or firm of *Palmer* and Co.; and they were duly appointed such assignees by virtue of an Act of Parliament made and passed in the 9th *Geo.* IV, c. 73, entitled, "An Act for the Relief of Insolvent Debtors in the *East Indies,*" and this was an action brought by the appellants for the purpose of recovering from the defendants the sum of sicca rupees 30,176. 10a. 1p., and interest . The plaint was a special declaration in *assumpsit,* containing special counts on the several arguments hereafter mentioned, with counts for money lent and advanced, money had and received, for interest, and upon an account stated. The defendants pleaded the general issue, *non assumpsit,* and gave notice of set-off.

The cause came on to be tried on 21st *July* 1832, upon certain written admissions entered into on both sides, when, by consent, a verdict was entered for the appellants, the plaintiffs, for sicca rupees 80,000, subject to the opinion of the Supreme Court on the following Case.

The insolvents above named were, in the month of *November* 1829, the members and partners of the firm of *Palmer* and Co., of *Calcutta,* merchants and agents, and in the habit of taking up, for the purposes of their said firm, loans from the said defendants, in their corporate capacity, as well on deposit of promissory notes of the Government of *Bengal,* commonly called Company's Paper, as upon discount of their own and other negotiable securities.

Previously to the adjudication of insolvency, and on the 12th *November* 1829, the said firm of Messrs. *Palmer* and Co., in the course of business, borrowed from the said defendants the sum of sicca rupees 103,900, as a security for which they deposited and delivered to the said defendants several Government promissory notes for different sums, amounting in all to sicca rupees 113,000, and on the same date made and delivered to the said defendants an agreement in writing, in the words and figures following:—

"Bank of *Bengal,* the 12th *November* 1829.

"Three months after date, we, *Palmer* and Co., promise to pay to *J. A. Dorin,* Esq. Treasurer of the Bank of *Bengal,* on account of the said bank, the sum of sicca rupees 103,900, with interest thereon, at the rate of five per centum per annum, for which said principal sum and interest, at the rate aforesaid, we have deposited in the said bank, as collateral security, Company's paper to the amount of sicca rupees 113,000; and in default of payment at the period above-mentioned, we hereby authorize the treasurer of the said bank for the time being, absolutely to sell or dispose of the said Company's paper for the reimbursement to the said bank, on or after the expiration of the said period, by public or private sale, the said treasurer rendering to us any surplus which may be forthcoming from such sale, and we being bound to make good to him whatever deficiency there may be below the amount of the said principal sum and interest, and the sale-price of the said Company's paper to be made on the price, to be calculated at the premium or discount of the Company's paper, on the day on which the said Company's paper shall be sold; but if the said treasurer shall not proceed to sell or dispose of the said Company's paper at such period, we, the said *Palmer* and Co., shall and will pay and allow unto the said Bank of *Bengal* interest, at and after the rate of £12 per centum on the said sum, up to the day on which

1836

YOUNG
v.
BANK OF
BENGAL.

the said sum shall be paid off, liquidated, or up to the day on which the said treasurer of the said Bank of *Bengal* shall, in pursuance of the power hereinbefore contained, sell and dispose of the said paper so deposited as aforesaid, as the case may happen.

"PALMER AND CO."

In the same month of *November* 1829, the firm, in like manner, took up from the said defendants five other loans on the like terms; that is to say, on the 17th *November* a loan of sicca rupees 47,800, on deposit and delivery of like Government promissory notes, to amount of sicca rupees 53,800; on the same 17th *November*, a further loan of sicca rupees 175,000, on deposit and delivery of like Government notes, to amount of sicca rupees 190,400; on the 18th *November* a loan of sicca rupees 29,400, on deposit and delivery of like Government notes to amount of sicca rupees 32,000; on the 20th *November* a loan of sicca rupees 20,300, on deposit and delivery of like Government notes, to amount of sicca rupees 22,100; and on the 25th *November* a loan of sicca rupees, 41,000, on deposit and delivery of like Government notes to amount of sicca rupees 44,600; on all which several occasions they signed and delivered written agreements, similar in form and purport to that of the 12th *November* 1829, above set forth.

On the 4th *January* 1830, and whilst the said several deposits were still in the hands of the said defendants, and the said six several agreements outstanding and unsatisfied, the said *John Palmer, George Alexander Prinsep, William Prinsep, and Charles Barber Palmer,* the partners in the said firm of *Palmer* and Co., filed their joint petition of insolvency in the

Court for the Relief of Insolvent Debtors at *Calcutta*, pursuant to the provisions of the Act of Parliament passed in the ninth year of the reign of his said late Majesty King George the Fourth, entitled "An Act to provide for the Relief of Insolvent Debtors in the *East Indies*," and were thereupon, on the same day, duly adjudged and declared insolvent; and the whole estate and effects of the said partnership firm were duly assigned to the common assignee, and were, at the time of the commencement of this action, duly vested in the said plaintiffs as assignees of the said insolvent firm.

At the time of the said adjudication of insolvency, the defendants were also holders and indorsees of two several promissory notes, made by the said firm of *Palmer* and Co.; that is to say, one promissory note of the said firm bearing date the 21st *October* 1829, whereby the said firm of *Palmer* and Co., three months after date, promised to pay to *Baboo Ruggooram Ghossain,* or order, the sum of sicca rupees 40,000 for value received; and one other promissory note bearing date the 4th *November* 1829, whereby the said firm of *Palmer* and Co., three months after date, promised to pay to the said *Baboo Ruggooram Ghossain,* or order, the sum of sicca rupees 60,000 for value received; which last-mentioned promissory notes, duly indorsed by the said payee respectively, had been discounted respectively by the said defendants, in the ordinary course of business before the said insolvency, on the dates thereof respectively, and the amount thereof respectively, after deducting discount paid by the said defendants to the said firm; and that both of the said last-mentioned promissory notes, at the time of action brought, were, and are still, wholly unpaid in the

1836.

YOUNG
v.
BANK OF
BENGAL.

hands of the said defendants as indorsees and holders thereof respectively.

After the said adjudication of insolvency, the time expressed in the said agreement of the said 12th *November* 1829, for payment of the said loan of that day, having expired, and no payment or tender of payment having been made thereof, the said defendants, on the 15th *February* 1830, sold and disposed of the said several Government promissory notes, or Company's paper, to amount of sicca rupees 113,000, so deposited and delivered by way of security as hereinbefore mentioned, at the price or bazar-rate of the day; and after retaining and satisfying themselves in full out of the proceeds of sale, the principal and interest of the said loan in the said agreement in writing of the said 12th *November* mentioned, with interest, and of the stamp duty thereon advanced by the said defendants, there remained a surplus arising from the said sale of sicca rupees 6778. 1a. 4p. in the hands of the said defendants.

Like default having afterwards been made in the payment or tender of payment of the said five other loans made on like deposit, and delivery of Company's paper as aforesaid, on the days expressed for payment thereof respectively in the said five other like agreements in writing, the said defendants sold and disposed of the whole of the Company's paper deposited and delivered as security for the said five loans respectively; and upon such last-mentioned sale there accrued a further surplus, after payment of the said loans, and interest and stamp duty thereon respectively, amounting in the whole to sicca rupees 23,398. 8a. 9p., making, with the said surplus on the said prior sale, the total sum of sicca rupees 30,176. 10a. 1p., which is the amount sought to be recovered by the plaintiffs in this action, together with interest at the rate of 6 per centum from the respective dates of sale, if the said Court shall allow the same.

At the time of the said sales respectively the said two several promissory notes, so indorsed and discounted as aforesaid, had respectively fallen due, and were in the hands of the said defendants wholly unpaid; the defendants claim to set off the amount due on the said two discounted promissory notes respectively against the said demand of the plaintiffs' assignees as aforesaid.

If this Honourable Court should be of opinion that the defendants are entitled to such set-off, the said verdict is to be set aside, and a verdict entered for the defendants. If, on the contrary, the Court should be of opinion that they are not so entitled, the verdict to stand for the plaintiffs for sicca rupees 30,176. 10a. 1p., together with interest, at the rate and from the dates above mentioned if allowed. The special case above stated came on to be argued in the said Supreme Court on the 25th *March* 1833, before the Honourable Sir *John Franks,* Acting Chief Justice, and the Honourable Sir *Edward Ryan,* Justice, and was adjourned to the following day, when the Court gave judgment for the defendants in the said action, and set aside the verdict formerly entered for the plaintiffs.

The plaintiffs having entered into the usual recognizances in the Supreme Court, obtained leave to appeal, and thereupon presented their petition of appeal to His Majesty in Council, praying that the judgment might be reversed, and that the verdict entered for the plaintiffs might be ordered to stand for the sum of sicca rupees 30,176. 10a. 1p., and interest, after the rate, and from the dates mentioned in the special case, for the following, amongst other reasons :—

I. Because, by the assignment made by the insolvents, in pursuance of the Act of the 9th *Geo.* IV, c. 73, the whole interest which the insolvents then had in the Company's paper and Government securities deposited with the respondents, and the right to redeem the same became vested in the assignees, in trust for all the creditors of the insolvents, and the interest and right so vested in them could not be defeated by any subsequent default of the insolvents, so as to give the respondents a right of set-off, which they did not possess at the date of the assignment.

II. Because the Company's paper and Government securities in question were deposited with the respondents under express contracts that the same should be returned upon payment of the respective sums, to secure which they were respectively deposited.

The respondents, on the other hand, contended that the judgments ought to be affirmed for the following, among other reasons :—

I. Because the Act of 9th *Geo.* IV, c. 73, for the relief of insolvent debtors in the *East Indies* provides by section 36, that when there has been mutual credit given by the insolvents and any other person or persons, one debt or demand may be set off against the other; and all such debts, dues, and claims, as may be proved under a commission of bankruptcy, according to the provisions of the English Bankrupt Act, may be proved under the Indian Insolvent Act, in the same manner, and subject to the like deductions, conditions, and provisions, as prescribed in the English Bankrupt Act.

II. Because the contracts stated in the declaration by which the Bank of *Bengal* agreed to pay to the insolvents the surplus remaining after the sale of the Government paper, beyond the amount of the loans which it was given to secure, were a credit given by the insolvents to the bank to the amount of such surplus: and the promissory notes held by the bank were a credit to the amount of such notes, given by the bank to the insolvents: thus constituting a mutual credit, and therefore a subject of set-off between the bank and the insolvents. The assignees therefore, by tendering the amount of such respective sums before default had been made, might have recovered the said Company's paper and Government securities in specie, by an action of trover, to which no set-off or other defence could have been made; and although default was afterwards made in payment of the loans, and the securities were sold before any tender made, yet the surplus monies arising from such respective sales were monies had and received for the use of *Palmer* and Co.

III. Because no claim of lien upon such surplus monies can be set up by the respondents in opposition to their express contract to render such surplus monies to *Palmer* and Co.; especially having regard to the fact, that the five several agreements made subsequently to the first agreement of the 12th *November* 1829, do not stipulate either that any surplus upon the former deposits should be a security against any deficiency in the produce of the subsequent deposits, or that any surplus upon the subsequent deposits should be a security against any deficiency in the produce of the former deposits.

Sir *W. Follett* and Mr. *Deacon* (Mr. *Cockerell* was with them) for the appellants.

At the time of the insolvency of *Palmer* and Co., which was on the 4th *January* 1830, no default had been made by them in the performance of the agreement of the 12th *November* 1829; for the period of three months from that date, the time when they promised to pay the bank of *Bengal* the sum of 103,900 sicca rupees, had not then expired. The right, therefore, to any surplus that might be forthcoming from the sale of the Company's paper deposited with the bank, became vested in the assignees of *Palmer* and Co.; and this right could not be defeated by any subsequent default of *Palmer* and Co. Each loan was the subject of a perfectly distinct and independent contract; and the surplus of the proceeds of the sale of one deposit could not be applied to any deficiency arising from the proceeds of the sale of another deposit. It was the clear intent of each agreement, that if the bank deemed it expedient to sell the Company's paper, the surplus of the proceeds of the sale, after satisfying the amount of the loan in each particular case, with interest at five per cent., should be restored to *Palmer* and Co.

There is a great difficulty in reconciling the various decisions in the books, on the subject of set-off in bankruptcy. It was the practice of the commissioners, before the passing of any statute on this subject, to take the accounts between the bankrupt and any other person, and to adjust the balance that was due from either one party or the other; and this practice was confirmed by the decisions of the courts of law. For even so far back as the time of Lord Chief Justice *North*, namely, in 1675, we find he thus expresses himself:—"If there are accounts between two merchants, and one of them become bankrupt, the course is, not to make the other, who perhaps, upon stating the accounts, is found indebted to the bankrupt, to pay the whole that originally was entrusted to him, and to put him, for the recovery of what the bankrupt owes him, into the same condition with the rest of the creditors; but to make him pay that only which appears due to the bankrupt on the foot of the account;" "otherwise," he adds, "it will be for accounts betwixt them, after the time of the other's becoming bankrupt, if any such were."* The same doctrine was also held by Lord *Hale,* who adjudged that in the case of a bankrupt, where there were dealings on account, a man should not be charged with the account on the credit side, and be put to come in as a creditor for the debt owing to himself, but should only answer to the bankrupt's estate the balance of the account.† Then came the 4th and 5th *Anne,* c. 17, which was the first statute that mentioned the balance and adjustment of the accounts between the bankrupt and his debtor; and by the eleventh section of which it was enacted, that, where there should appear to have been mutual credit given between the bankrupt and any person who should be his debtor, and the accounts should be open and unbalanced, then the commissioners or the assignees might adjust the accounts, and take the balance due in full discharge thereof, and the debtor should not be compelled to pay more than should appear to be due on such balance. This enactment, which, however, gave the commissioners no more power than they originally possessed, was repeated, with some slight variation, by the 5th *Geo.* I, c. 24; and after the expiration of that Act, a similar clause, but improved in point of precision, was re-enacted by the 5th *Geo.* II, c. 30, s. 28, which, besides the power given to the commissioners to adjust the accounts in cases of mutual credit, added, that where there were mutual debts between the bankrupt and any other person, one debt might be set off against another. Before this statute, therefore, there was no set-off allowed in bankruptcy, except what was the subject of mutual account between the bankrupt and any other person. The next statute was the 46th *Geo.* III, c. 135, s. 3; by which the right of set-off was given, notwithstanding a prior act of bankruptcy, provided the credit was given to the bankrupt two months before the date of the commission, and the person, at the time of giving it, had not notice of a prior act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment.

---

* Anon. 1 Mod. 215.

† *Chapman* v. *Derby,* 2 Vern. 117.

Then came the present Bankrupt Act, 6 *Geo.* IV, c. 16, which has incorporated the former provisions, with certain amendments, the words of which it will be necessary to refer to. By the fiftieth section of this statute, it is enacted, "That where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by, him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt may also be set off, in manner aforesaid, against such estate, provided that the

1836.
YOUNG
v.
BANK OF
BENGAL.

person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." This statute, it will be seen, omits the provision contained in the 46th *Geo.* III, c. 135, s. 3, that the credit must have been given two months before the date of the commission; and, therefore, the account may now be taken down to the date of the commission. It also confines the notice by which the party is to be affected, to the notice of an act of bankruptcy; and it declares that every debt or demand, made proveable by the act, may also be set off against the bankrupt's estate; which last provision, if it is in any way important to the respondents' case, it will be seen is not contained in the Indian Act, under which they claim their right of set-off.

By that Act, 9 *Geo.* IV, c. 73, which is intitled, "An Act to provide for the Relief of Insolvent Debtors in the *East Indies,*" it is enacted by section 36, "That where there has been mutual credit given by the insolvent or insolvents and any other person or persons, one debt or demand may be set against the other; and all such debts, dues, and claims, as may be proved under a commission of bankruptcy, according to the provisions of the 6th *Geo.* IV, c. 16, or may hereafter be proveable under such commission, by virtue of any Act hereafter to be passed, may also be proved upon any such hearing as is hereinbefore mentioned, in the same manner, and subject to the like deductions, conditions, and provisions, as in the said last-mentioned Act are set forth and prescribed."

Now the right of set-off given by this Act, it will be observed, is contained in very few words; for the section merely says, that where there has been mutual credit given, one debt or demand may be set off against the other; the last part of the section relating entirely to the right of proof. It also confines the right of set-off to cases where there has been mutual credit, omitting those words contained in the English Bankrupt Act, "or where there are mutual debts between the bankrupt and any other person."

It is important, therefore, in the first place, to consider what is meant by the expression, "mutual credit." Mutual credit must mean something mutual, on both sides, a credit given by each party to the other. Now, what were the dealings of the parties in the present case? The money was lent by the bank to *Palmer* and Co., and *Palmer* and Co. deposited the Company's paper with the bank under the terms of a special agreement as a security for the loan. The loan was, of course, a credit given by the bank to *Palmer* and Co.; but how can the deposit of the paper be termed a credit given by *Palmer* and Co. to the bank? The credit meant by the statute is one that must inevitably terminate in a debt. But the deposit of these securities with the bank upon the terms of the agreement of the 12th *November* 1829, was not such a transaction as would necessarily end in a debt. If *Palmer* and Co., at the expiration of three months from the date of that agreement, or even before the bank had sold the paper deposited, had repaid the bank the amount of the loan, there would have been no debt due from the bank to *Palmer* and Co. There was in this case also no default made by *Palmer* and Co. at the time of their insolvency. Their insolvency took place on the 4th *January* 1830; and they were not bound to repay the money borrowed until three months after the 12th *November* 1829, which of course would not be be-

1836.

YOUNG
v.
BANK OF
BENGAL.

fore the 12th *February* 1830. How could commissioners of bankrupt in such a case have stated an account between the parties, as directed by the statute? Was there, at the period of *Palmer* and Co.'s insolvency, any debt due to them from the bank, or had they previously given such a credit as must inevitably have ended in a debt due to them from the bank? *Non constat,* that the assignees under their insolvency would not redeem the securities before the three months had expired by paying off the loan. Could the bank have in that case claimed a lien on these securities, which were deposited for a specific purpose in respect of the two promissory notes not then due, which they had previously discounted for *Palmer* and Co.? The right of set-off, to be good in favour of one party, must also hold in favour of the other. Now, supposing the bank of *Bengal* had brought an action against *Palmer* and Co., upon either of these promissory notes, and before any default made by the latter in the performance of the agreement of the 12th *November* 1829, it is clear that they would not have had a right to set off the amount of any uncertain surplus that might arise from the proceeds of the sale of the Company's paper in case default should be made in the repayment of the loan, and in case the bank should think proper to sell. A mere deposit, as this was, for a special purpose, is not like the trust or credit given by a principal to a factor, where the goods are placed in the factor's hands for the express purpose of sale, and where the transaction, therefore, must inevitably terminate in a debt from the factor to the principal. Here the bank had no power to sell until default was made by *Palmer* and Co., and no default whatever had been made by them at the period of their insolvency. The very ex-

1836.
YOUNG
v.
BANK OF
BENGAL.

tent of the clause relating to mutual credit in the *English* Bankrupt Act, only authorizes the commissioners to state the account down to the date of the commission. Could the amount, then, of this uncertain surplus of the proceeds of a sale, depending on an uncertain event, form an item on the debit or credit side of such account? The surplus which did eventually arise from the sale of the Company's paper by the bank long after the insolvency of *Palmer* and Co., would merely form an item in an account between their assignees and the bank; and in the case already referred to before Lord Chief Justice *North,*[*] though he admits the law to be, to make a party, who has had dealings with a bankrupt, pay only what appears due to the bankrupt, on the foot of the account as stated between them, yet, he says, "it will be otherwise for accounts betwixt them, after the time of the bankruptcy."

The grounds on which the recent case of *Hewison* v. *Guthrie*[†] were decided, show clearly that, in order to bring a case within the clause of mutual credit in the Bankrupt Act, the credit must have been given before the bankruptcy. That was an action of trover, brought by the assignees of a bankrupt, to recover from the defendant a policy of insurance. The defendant pleaded that he was an insurance broker, and that there was a custom in the city of *London* for all insurance brokers to have a lien upon all policies in their possession for their general balance; that previous to the time of effecting the policy in question, mutual accounts existed between the defendant and the bankrupt; that whilst such mutual dealings and accounts existed, the bankrupt gave an order to the defendant to effect the policy; and that at the time of the request and refusal to deliver the policy, the bankrupt was indebted to the defendant, on the general balance of accounts between them, in the sum of £201. 11*s.* 9*d.*, and that he had a lien on the policy to the extent of this debt. The plaintiffs replied, that this sum was the price of certain canvass sold by the defendant to the bankrupt upon a credit of twelve months, which credit had not expired at the time of the conversion; that at the time of the sale of the canvass the defendant drew a bill of exchange on the bankrupt for the amount of the price, payable at twelve months after date, which period had not elapsed at the time of the conversion, or at the time of the commencement of the action, which bill the bankrupt accepted, and the defendant received on account of the price of the canvass. To this plea there was a special demurrer. It was contended in support of the demurrer, that though the defendant, by taking a security for his debt, might have lost his lien, yet that on the plea, it appeared there had been a mutual credit between the parties, within the meaning of the 6th *Geo.* IV, c. 16, s. 50, and that in respect of such mutual credit the defendant was entitled to retain the policy. But the Court of Common Pleas decided, that even if the facts would have warranted such a defence, he was bound to plead them specially, as he had pleaded the custom, in order to bring himself within the statute; and that it did not appear on the record, that the mutual credits, upon the result of which the balance was claimed, were given before the bankruptcy, so as to make the balance claimed a balance due at the time of the bankruptcy; the only

---

[*] Anon. 1 Mod. 215

[†] 2 Bing. N. C. 755.

1836.
YOUNG
v.
BANK OF
BENGAL.

allegation being, that the bankrupt was indebted to the defendant in this general balance, "at the time of the request and refusal to deliver the policy, and of the supposed conversion." So, in the present case before the Court, it is quite clear, that the credit which the respondents contend was given to them by *Palmer* and Co., and upon the result of which the claim to retain the balance of the proceeds of the sale of the Company's paper was not given by *Palmer* and Co. before their insolvency; for, before this period, the bank had nothing but a conditional power of sale.

The case that has created the greatest confusion on the subject of set-off in bankruptcy is that of *Ex parte Deeze.** In that case, a packer had a small demand against a bankrupt for packing goods, and also a much larger demand against him for money lent; and the bankrupt had likewise a small demand against the packer for wine; and upon the question whether the packer could retain the goods till his whole debt was satisfied, Lord *Hardwicke* determined that he might, saying, "Notwithstanding the rules of law as to bankrupts reduce all creditors to an equality, yet it is hard where a man has a debt due from a bankrupt, and has at the same time goods of a bankrupt in his hands, which cannot be got from him without the assistance of law or equity, that the assignees should take them from him without satisfying the whole debt; and therefore the clause in the Act of Parliament of the 5th *Geo.* II, relating to mutual credit, has received a very liberal construction. These goods were in the petitioner's hands, in the nature of a pledge, for some part of his debt, that is, the price of the packing;

---

* 1 Atk. 228.

and what right has a Court of Equity to say, that if he has another debt due from him from the same person, the goods shall be taken from him without having the whole paid? " Now it is submitted that this is not a correct exposition of the law on this subject.

[The ATTORNEY-GENERAL : We do not contend that it is.]

The observations made by Lord *Hardwicke* in that case have misled the Courts in the decision of several subsequent cases, and are also utterly at variance with another decision of the same learned Judge, which occurred about six years afterwards. That was the case of *Ex parte Ockenden,** in which the circumstances were these : The bankrupt, who was a flour-factor, had considerable dealings with the petitioner, who was a miller, in grinding his corn for him; and was, at the time of his bankruptcy, indebted to the petitioner in £286, for grinding corn on various former occasions : the petitioner having in his possession, at the time of the bankruptcy, a quantity of wheat belonging to the bankrupt, which was sent to be ground, as well as some flour, and a great number of sacks, upon all which he claimed a lien, not only for his charge of £16. 5*s.* for grinding the corn then in his hands, but also for £286, previously due; and Lord *Hardwicke,* in the absence of any evidence of contract, or of custom, that a miller had a lien for his general balance, expressed a strong opinion that he had only a particular lien *pro tanto,* and not a general lien; and he qualified his former decision in *Ex parte Deeze* by saying, that in that case there was evidence that it was usual for packers to lend money to clothiers, and the cloths to be a pledge, not only for the work done in packing, but for the loan of money likewise. The case stood over for further consideration; and after taking some time to deliberate on the matter, his Lordship decided according to the opinion he had expressed on the hearing.* It seems, therefore, quite evident, that Lord *Hardwicke* had changed the opinions he had expressed in *Ex parte Deeze,* and that that case can only be supported on the ground of the custom having been proved, that a packer could retain for his general balance; for in *Ex parte Ockenden,* where there was no contract for such a lien, nor any general custom proved to establish it, he held that the miller had only a particular lien *pro tanto.* This doctrine, too, was subsequently acted upon by Lord *Mansfield,* and the Court of King's Bench, in *Green* v. *Farmer*;† where it was decided, that a dyer had no lien for a general balance, unless a contract could be implied from any usage of trade, or manner of dealing; and Lord *Mansfield,* referring to his own note of *Ex parte Ockenden,* said, that that case was accurately reported.‡

---

* 1 Atk. 235.

---

* In *Green* v. *Farmer,* 4 Bur. 2222, Lord Mansfield says the hearing was in August 1754; and that on the 20th December 1754, no precedents being found, Lord Hardwicke determined accordingly.

† 4 Bur. 2214.

‡ Lord Mansfield also said, that *Ex parte Deeze* was well reported. But the accuracy of the report of that case does not appear to be very consistent with what Lord Hardwicke says about it in *Ex parte Ockenden, namely,* that there was evidence of an usage of a general lien in the dealings of packers with their employers; for in the report of the case in *Atkyns,* there is certainly nothing said about such a custom having been proved. Lord Henley, in commenting on *Ex parte Deeze,* in his Treatise on the Bankrupt Law, (p. 108,) thinks the fact is obvious, that Lord Hardwicke had changed his mind in *Ex parte Ockenden,* upon the extent of the statute of mutual credit, and that

The next case that occurred after *Ex parte Deeze*, upon the construction of the mutual credit clause in the 5th *Geo.* II, c. 30, s. 28, was *Ex parte Prescott*;* where the petitioner, being a creditor of the bankrupt for £110, and a debtor to him upon bond for £340, payable at a future day, applied that he might be permitted to set off the former sum against the principal and interest due on the bond; and Lord *Hardwicke* held, that it was within the equity of the statute; for though it was not in strictness a mutual debt, yet it was a mutual credit, as the bankrupt gave the petitioner a credit in consideration of the bond, though payable at a future day, and the petitioner gave the bankrupt credit for the debt he owed the petitioner on simple contract. This case has ever since been considered as a leading authority, that a debt contracted before the bankruptcy, but not payable till afterwards, may be set off against a debt from the bankrupt payable presently. And it was upon this principle that the case of *Collins* v. *Jones*† was decided, which may probably be relied on by the other side. That was an action by the assignees of a bankrupt on a promissory

he took hold of the circumstance of there being evidence of usage in *Ex parte Deeze*, to reconcile the two decisions. And if, indeed, he made the observations as reported in *Atkyns*, it seems highly probable that such was the fact; for they are entirely at variance with the principle on which he afterwards said he founded that decision. When he drew the distinction, however, between a general and a particular lien in *Ex parte Ockenden*, it may have escaped his memory, that one of the reasons assigned by him for thinking that *Ex parte Deeze* came within the clause of mutual credit was, that there was an account depending between the packer and the bankrupt, there being on the one side £ 19 due for packing, and on the other side much about the same sum due to the bankrupt's estate for wine.

---

* 1 Atk. 230.

† 10 B. & C. 777.

note of the defendant, which had been discounted by the bankrupt, and against which the defendant claimed a set-off on a bill accepted by the bankrupt; this bill the defendant had taken in part of the discount; he had afterwards negotiated it, and was subsequently obliged to pay the amount to the holder six days after the commission had issued against the bankrupt; and it was held, that he had a right to set off the bill against the demand of the assignees on the promissory note: for that the bankrupt, by discounting the defendant's note, gave credit to the defendant; and the defendant, by taking the bankrupt's acceptance, gave credit to the bankrupt; and that there had thus, at the time of the bankruptcy, been mutual credit between these parties. Mr. Justice *Bayley,* in giving his judgment in this case, dwells on a material distinction between the clause of set-off in the 5th *Geo.* II, c. 30, s. 28, and the provision in the 6th *Geo.* IV, c. 16, s. 50; the former statute merely providing for cases where there had been mutual credit given by the bankrupt and any other person, or mutual debts, at any time before such person became bankrupt: speaking of the mutual credit, and the mutual debts, each of them in the past tense, and making the act of bankruptcy the time at which the set-off is to cease; while the latter statute includes cases where there has been mutual credit, and where there are mutual debts: speaking therefore of the mutual credit in the past tense, and of mutual debts in the present; the latter statute also giving the set-off, notwithstanding any prior act of bankruptcy, before the credit given, or the debt contracted, and declaring that every debt or demand made proveable may also be set off, provided the person claiming the set-off had not, when such credit was

1836.

YOUNG.
v.
BANK OF
BENGAL.

given, notice of the act of bankruptcy. Mr. Justice *Bayley* goes on to say, "These were then mutual debts between the parties, and they had their origin in a mutual credit before the bankruptcy." But in the present case, the credit is all on one side before the bankruptcy; for the deposit of the Company's paper was not credit given by *Palmer* and Co. to the bank of *Bengal*, the bank having no power to negotiate it, or sell it, unless *Palmer* and Co. made default in payment of the money they had borrowed of the bank; and at the time of their insolvency, there were not only no mutual debts between the parties, but it was uncertain whether the transaction of the deposit of this paper with the bank would ever terminate in a debt from the bank to them.

In the last-cited case Mr. Justice *Bayley* lays great stress upon that of *Hankey* v. *Smith*;* in which it was held, that an acceptance in the hands of an indorsee, not due until after the bankruptcy of the acceptor, constituted an item of credit between the bankrupt and the indorsee; and in which Mr. Justice *Buller* observes, that if a bill of exchange, which is accepted, is sent out into the world, credit is given to the acceptor by every person who takes the bill; but the subsequent case of *Ex parte Hale*,† which occurred before Lord *Loughborough*, is contrary to this last decision. There the petitioner was the indorser of a bill of exchange accepted by the bankrupt, and being obliged to take it up in consequence of the bankruptcy, he claimed to set off the amount against a debt he owed the bankrupt; but Lord *Loughborough* held, that though the petitioner might prove, yet he could not set it off;

---

* 3 T. R. 507.

† 3 Ves. 304.

that he could not, by paying the bill after the bankruptcy of the acceptor, put himself into a better situation than any other creditor ; that there was no mutual credit ; that though the acceptance constituted a debt due at the time of the bankruptcy, that debt was not due to the petitioner, and that therefore the set-off failed.

The decision of the Court of Common Pleas in the recent case of *Gibson* v. *Bell,** is another authority, which may, at first sight, seem to favour the claim of the respondents; but upon an examination of the grounds of the judgment in that case, it will be seen that they do not apply to the facts of this. The bankrupt there had sold and delivered a quantity of wine to the defendant, which he agreed to pay for in part, by accepting a bill of exchange to be drawn by the bankrupt ; and the defendant having failed to do so, the assignees brought an action against him for not accepting the bill pursuant to his agreement ; to which the defendant pleaded a set-off for a debt due to him from the bankrupt for money lent ; and it was held upon demurrer that the set-off was good. But the Chief Justice, in delivering his judgment, said, although the form of action was a claim for unliquidated damages for not accepting the bill, yet that the agreement was, in substance, a contract to accept a bill in payment of the remainder of the price of certain goods sold and delivered by the bankrupt to the defendant; and the bill of exchange was expressly alleged to have been drawn " for the balance then due and owing from the defendant to the bankrupt, upon the account aforesaid." That in substance, therefore, the bill, if accepted, would have been a security for the payment, at a future day, of a settled and ascertained balance, due upon an account, in which the price of the goods sold to the defendant formed one side, and partial payment made by the defendant the other side. That the principle of the bankrupt laws is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That the claim of the bankrupt in that case was one which would, in its nature, terminate in a debt, and nothing else. For if the demand had not been enforced until after the time for which the bill was to run, the demand became actually a debt, for which the bankrupt might have brought his action for goods sold, or on an account stated; and if enforced before the time had expired, his demand was one which must become a debt in a short time, and of which the present value was determinable, by deducting the discount for the time the bill had still to run. Now, apply this reasoning to the facts of the present case. Was there, at the time of the insolvency of *Palmer* and Co., "any settled and ascertained balance due upon an account" between them and the Bank of *Bengal*? The balance was not only unsettled and unascertained, but it was wholly uncertain whether there would be any balance due to them from the bank; for if the assignees of *Palmer* and Co. had repaid the bank, the 103,900 rupees, according to the agreement of the 12th *November* 1829, they would have had a right to an immediate return of the Company's paper, which they had deposited with the bank to secure the payment of this sum; and if they had not repaid the amount of the loan at the end of the three months, the balance would have been equally uncertain; for it would in that case depend on the amount of the proceeds of the sale of the Company's paper, a transaction of such a nature as must terminate in a debt. The answer to the former question is an answer to this; for if either *Palmer* and Co., or their assignees, had repaid the loan to the bank within the stipulated time, the bank would have had no power to sell; and even if they had sold, it would be just as uncertain whether there would be any surplus, after satisfying the amount of the loan.

---

*1 Bing. N. C. 743.

But the case which, it is presumed, the respondents will chiefly rely on in their favour, is *Olive* v. *Smith.** In that case, A., a merchant, employed B., a broker, to effect policies and sell goods, and trusted him with the possession of the policies and the goods. A., being indebted to B. for premiums of insurance, and having obtained an advance of money upon a pledge of goods placed in B.'s hands for sale, but not on those goods to the exclusion of A.'s general credit, became bankrupt; after which, a loss happening on one of the policies, B. received it from the underwriters. This was held to be a case of mutual credit, and that B. might retain the sum received for the loss, not only in the liquidation of the balance due for premiums, but also of his advances. Lord Chief Justice *Gibbs,* who tried the cause, decided it on the ground that the bankrupts had trusted the defendants with the possession of goods and of policies of insurance, and that the defendants had trusted the bankrupts with the money advanced, and the premiums paid for them on the policies; and that the general principle was, that wherever each

---

* 5 Taunt. 56.

1836.
YOUNG
v.
BANK OF
BENGAL.

party has trusted the other with the possession of value, the assignees of either party, in case of his bankruptcy, cannot withdraw that value from the other, but on the terms of paying him what is due between them. With all due respect, however, for that learned Judge, it is submitted that this reasoning is not correct in point of law; for it would lead to this monstrous conclusion,—that in every case of deposit of goods, let the purpose be what it may, if the owner of the goods be indebted to the depository, the latter has, by virtue of the statute of mutual credit, a right to retain the goods deposited till he is paid the whole of his demand,—a proposition which could never have been intended by any of the clauses relating to mutual credit in the bankrupt laws. The doctrine, indeed, that was propounded by the learned Judge in that case,—as is justly observed by Lord *Henley* in his work on the Bankrupt Law,—has not been generally approved of by the profession; and it has accordingly been since confined within much narrower bounds in subsequent cases. It will be observed, too, upon referring to the report of *Olive* v. *Smith*, that the counsel who argued in support of the claim of set-off, relied in a great measure upon the doctrine in *Ex parte Deeze*; and after referring to Lord *Hardwicke's* subsequent decision in *Ex parte Ockenden*, contended that his Lordship's first opinion was the best. The judgment, also, of the Court is mainly founded on *Ex parte Deeze*; *Gibbs*, Justice, saying, that the Courts have always inclined to support the doctrine in that case; and he adds, that in the case *Ex parte Ockenden*, no judgment was given: in the last of which observations, however, he is corrected by the counsel in the argument, and in the former of which it will be also found,

ADVOCATE

that his statement is far too general and sweeping. Nearly the same period elapsed after this decision as the interval between *Ex parte Deeze* and *Ex parte Ockenden,* when the learned Judge, then became Lord Chief Justice, following the example of Lord *Hardwicke,* but exhibiting perhaps a specimen of great ingenuity and acuteness, thought it necessary in a subsequent case to qualify the proposition he had so broadly laid down in *Olive* v. *Smith.*

The case alluded to is that of *Rose* v. *Hart,** where the assignees of a bankrupt brought an action of trover for a quantity of cloths which had been deposited with the defendant, a fuller, for the purpose of being dressed. It was contended at the trial, that the case came within the principle laid down in *Olive* v. *Smith,* and that the defendant was entitled to retain the cloths for his general balance; but a verdict was given for the plaintiffs; and the point was reserved by Mr. Justice *Holroyd,* before whom the case was tried. When the rule *nisi* was moved for a new trial, Lord Chief Justice *Gibbs* acknowledged, that the question was of the utmost importance, and that the Court was quite open to hear it discussed. After the case had been fully argued,—when the counsel, in support of the rule, rested entirely on the language of the Courts in *Ex parte Deeze, French* v. *Fenn,*† *and Olive* v. *Smith,*—the Court took time to consider its judgment, which was ultimately pronounced by Lord Chief Justice *Gibbs.* These facts are stated to show that the question was maturely and deliberately considered by the Court before it came to a decision. The Chief Justice, in delivering his judgment, admitted, that the case was not distinguishable from *Ex parte Deeze,* upon which the decision in *Olive* v. *Smith* was founded ; and after adverting to the qualification of *Ex parte Deeze* in *Ex parte Ockenden,* which he says was lost sight of by the Court in *French* v. *Fenn,* he adds, that this last-mentioned case having been followed by a string of cases, running through a period of more than thirty years, whatever he might think of the original decision, he could not persuade himself to break in upon a class of cases so long established ; and that if they could not be supported without carrying the doctrine in *Ex parte Deeze* to its fullest extent, he should be ready to follow it rather than overturn what had been settled upon the subject for such a length of time. "But," he observes, "it is first to be considered whether these cases may not be supported by a construction of the Act, which will not go to that extent, and will leave the opinion of Lord *Hardwicke,* in the case of *Ex parte Ockenden,* untouched." He then cites the 28th section of the 5th *Geo.* II, c. 30, by which it was enacted, that "where there had been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person," the commissioners should state the account between them, and one debt might be set against another ; and what should appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, should be claimed on either side respectively." "Something more," he goes on to say, "is certainly meant here by mutual credits than the words mutual debts import; and yet upon the final settlement, it was enacted merely that one debt shall be set against another. We think this shows that the legislature meant such credits only as must, in their nature, terminate in debts ; as where a debt is due from one party, and credit given by him to the other, for a sum of money payable at a future day, and which will then become a debt ; or where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other : in such case the credit given by the delivery of the property must, in its nature, terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with.'' This principle, the Chief Justice observes, will support all the cases from *French* v. *Fenn* to *Olive* v. *Smith* ; in all of which, he adds, "it will be found, that that which has been allowed as a mutual credit has always been of such a nature as must terminate in a cross debt. To this extent we think the statute may be carried, but no further; and we follow the final opinion of Lord *Hardwicke* in determining, that the delivery of these cloths to the defendants, for the purpose of being dressed, does not form an article of mutual credit in his favour, within the fair construction of the clause relied on.''

---

* 8 Taunt. 499. † 1 Cook, Bankrupt Laws, 536, 7th edit.

The case of *French* v. *Fenn*,* referred to by Lord Chief Justice *Gibbs* in the last-mentioned case was this : *Cox, Holford*, and *Fenn*, purchased a row or string of pearls, for a joint adventure in trade, the money for the purchase being advanced by *Fenn*. *Cox* became bankrupt ; after which, *Fenn* sent the pearls to *China*, where they were sold, and the proceeds remitted to *Fenn*. *Cox*, at the time of his bankruptcy, was indebted to *Fenn* in a much larger sum than a third of the profits of the adventure. The assignees of *Cox* brought an action against *Fenn* for *Cox's* share of the profits, to which the defendant pleaded a set-off; and it was contended on his behalf, that there was a mutual credit, though not a mutual debt, at the time of the bankruptcy, and that one could not be demanded without satisfying the other, and the Court, on the authority of *Ex parte Deeze,* determined that *Fenn* was protected from the claim of *Cox's* assignees, by the clause of mutual credit. But in this case it is to be observed, that there was a debt due from *Cox* to *Fenn,* and *Cox* entrusted *Fenn* with his share in the pearls for sale, which, when sold, would constitute a cross debt from *Fenn* to *Cox,* for his share of the proceeds. The credit, therefore, given in this case was of such a nature, as could not fail to terminate in a debt. And the same observation applies to the cases of *Smith* v. *Hodson,** and *Parker* v. *Carter,*† which may possibly be relied on by the other side.

---

* 1 Cook, B. L. 536, 7th edit.

The limitation of the clause of mutual credit, as defined by the judgment of the Court in *Rose* v. *Hart,* has been recognised, and acted upon in many subsequent cases, as in *Sampson* v. *Burton,*‡ where it was decided that a guarantee against contingent damages did not come within it; in *Easum* v. *Cato,*§ where Mr. Justice *Bayley* says, that the 5th *Geo.* II, c. 30, s. 28, "is now held to be confined to such credits as must, in their nature, terminate in debts;" and in *Rose* v. *Sims,*|| which is very strong in favour of the restriction. In this last case, the bankrupt having given the defendant his acceptance for £20, the de-

---

* 4 Term R. 211.

† 1 Cook, B. L. 548.

‡ 2 Brod. & Bing. 89.

§ 5 Barn. & Ald. 861.

|| 1 Barn. & Adol. 521.

1836.

YOUNC
v.
BANK OF
BENGAL.

fendant, in consideration thereof, undertook that he would indorse to the bankrupt a bill drawn by the defendant on E. E., payable to the defendant's order. The defendant gave the bill, but would not indorse it, the acceptance of the bankrupt having been dishonoured; and the assignees brought a special action of assumpsit against the defendant, for a breach of contract, in refusing to indorse the bill. It was contended, on behalf of the defendant, that if he had indorsed the bill, and been sued upon it, he might have set off the bankrupt's dishonoured acceptance, and that he was entitled to the same advantage in an action for not indorsing; and that it was therefore a case of mutual credit, within the 6th *Geo.* IV, c. 16, s. 50. But the Court of King's Bench held that the contract to indorse was not within the statute, and could not have been set off by the assignees against the £20 due from the bankrupt to the defendant. Mr. Justice *Parke* observing, "this is not a case of mutual credit within the Bankrupt Act; it is merely a case where a cause of action arises for the non-performance of a contract. The provision, with respect to mutual credit, is confined to debts between the bankrupt and other parties, or to transactions necessarily ending in debts."

In the case now before the Court, the respondents having entered into an express agreement to return the surplus of the proceeds of the Company's paper to *Palmer* and Co., cannot claim the right of set-off under the clause of mutual credit, contrary to the terms of such express agreement. This was decided in the case of *Clark* v. *Fell,** which was an action of trover against the bankrupt's assignees for the recovery

---

* 4 Barn. & Adol. 404.

1836.

YOUNG
v.
BANK OF
BENGAL.

of a stanhope, which the plaintiffs had sent to the bankrupt to be repaired. It appeared that the plaintiffs had agreed to pay for the repairs in ready money; that the repairs were not completed until after the bankruptcy; that the plaintiffs, when they sent the stanhope to be repaired, were the holders of the bankrupt's acceptance for £24, which became due before the bankruptcy, and that the charge for repairs was £20. The plaintiffs demanded the stanhope, proposing to strike off the £20 from the amount of the bankrupt's acceptance; but the assignees refused to deliver it without actual payment. The plaintiff contended, that the two sums of £24 and £20 were mutual debts at the time of the bankruptcy, and ought to be set off against each other, according to the 6th *Geo.* IV, c. 16, s. 50. But the Court of King's Bench held, that although the statute would have applied if there had been no contract to pay ready money,—as the bankrupt was indebted to the plaintiffs, and the question would then have been on which side the balance lay,—yet that the agreement to pay ready money made all the difference, and that the bankruptcy of one party did not rescind an express contract establishing a lien for payment of a particular debt.

Further it is submitted, that where property is deposited upon trust for a specific and limited purpose, and where the trust is unexecuted at the time of the bankruptcy of the party who has made the deposit, a transaction of such a nature cannot be considered a case of mutual credit within the 50th section of the Bankrupt Act. That this is a correct exposition of the law, appears plainly from the case of *Key* v. *Flint*,*

---

* 8 Taunton, 21.

1836.

YOUNG
v.
BANK OF
BENGAL.

in which it was decided by the Court of Common Pleas, and afterwards by Lord *Eldon,* when the same case came before him in the shape of a petition in bankruptcy. The case in the Common Pleas was an action of trover by the asignees of a bankrupt for a bill of exchange for £650, which had been deposited by the bankrupt with the defendant for the purpose of raising money, and making advances upon it. The defendant advanced £155 upon it, and promised to make further advances, which he never did; and the assignees having tendered to the defendant the amount of the money he had advanced on the bill, it was held, that they were entitled to recover the amount of the bill, although a general balance remained due from the bankrupt to the defendant, and that this did not form a case of mutual credit within the 5th *Geo.* II, c. 30, s. 28. Mr. Justice *Dallas,* in giving his judgment, dwells on the fact that the bill was not left on the general account, but for the express purpose of having money advanced, and that the defendant held the bill only as a security for the sums advanced. When the case afterwards came before Lord *Eldon,** he entirely agreed with the decision of the Court of Common Pleas, saying, that it was contrary to natural equity that a creditor of a bankrupt, who had made advances on the security of a bill of exchange deposited with him for that purpose, and who had undertaken to receive the amount when due, and return the surplus, should set off advances prior to the transaction against a demand by the assignees for the bill. Now to apply this last decision to the present case, it will be recollected that the two promissory notes, the amount of which the bank claims to set off against the surplus of the proceeds of the Company's paper, were (as is expressly stated in the special case) discounted by *Palmer* and Co. with the bank, on the dates thereof respectively, namely, on the 21st *October* 1829, and the 4th *November* 1829; and that the amount thereof respectively, after deducting the discount, was paid by the bank to *Palmer* and Co. Both these transactions, therefore, were previous to the deposit of the Company's paper by *Palmer* and Co., which did not take place till the 12th *November* 1829; so that, according to Lord *Eldon's* decision in *Ex parte Flint*, it would be most inequitable that the respondents in the present case, who had undertaken in the event of their selling the Company's paper, "to render any surplus which might be forthcoming from such sale to *Palmer* and Co.," should be permitted to set off the prior advances made by them on the security of the two promissory notes. For it must be recollected, that in the present case, as in that of *Ex parte Flint*, the deposit was not on the general account, but as a security only for the 103,900 rupees advanced by the bank to *Palmer* and Co.

---

* *Ex parte Flint,* 1 Swanst. 30.

The decision in *Key* v. *Flint* has been also recognised by the Court of King's Bench in the subsequent case of *Buchanan* v. *Findlay*,* which was an action by the assignees of *Duff* and *Brown* for money had and received. *Duff* and *Brown* had remitted two bills, amounting together to £1740, to *Findlay* and Co., with directions to get them discounted; but *Findlay* and Co. being then under acceptances to *Duff* and Co. to the amount of £50,000, kept the bills in their own possession, and received the amount of them, when due, from the acceptor. Previous to their becoming due, however, *Duff* and Co. became bankrupts, and their assignees then sued *Findlay and* Co. for the amount of the two bills; and it was held, that *Findlay* and Co. could not set off in this action any debt due to them from *Duff* and Co. Lord *Tenterden,* who delivered the judgment of the Court, said there was no substantial distinction between that case and *Key* v. *Flint*; that, in both cases, the bills were sent to the defendants for a specific purpose; and as soon as the defendants declined to perform that purpose, the right to retain the bills ceased, and the party was legally bound to restore them on demand; that if goods or bills are deposited for a specific object, and the bailee will not perform that object, he must return them; and that the property of the bailor is not diverted or transferred until the object is performed. It was argued there, in favour of the set-off, that the assignees, by bringing an action for money had and received, had treated their claim as a pecuniary demand; that the bills were deposited for the purpose of being converted into money, and that therefore the transaction must have ended in a debt; but Lord *Tenterden* observed, that that circumstance made no difference in the case; and that although the bills were paid to the defendants after the commission, yet that a set-off after the payment of the bills was to be governed by the same rules as a lien before payment.

---

* 9 Barn. & Cress. 738.

But there is another important way of considering this question, with reference to the decisions in bankruptcy, in cases of equitable mortgage. The rule that governs all those cases is uniform, namely, that a deposit of deeds or securities for a particular purpose will not give the depository a lien upon them for any other purpose; as where deeds are deposited to obtain further credit, the depository has no lien on them for money previously advanced. This was decided in *Mountford* v. *Scott*,[*] as well as in *Ex parte Flint*, already cited. So in *Ex parte Whitbread*,[†] where a lease was deposited as a collateral security for £1000, and there was a subsequent advance of £100, Lord *Eldon* held, that if the original bargain did not look to future advances, no subsequent advance could be a charge unless the subsequent transaction was equivalent to the original transaction. The same principle indeed pervades all the cases on this subject, which decide, that the lien originally created can only be enlarged by a subsequent express agreement; *Ex parte Marsh*,[‡] *Ex parte Alexander*,[§] *Ex parte Hannen*.[||] Now the deposit of the Company's paper in this case, by *Palmer* and Co., with the bank of *Bengal*, was in the nature of an equitable mortgage, giving the bank a lien on the securities deposited to the amount of the sum borrowed, *viz.* 103,900 sicca rupees, and subject to the terms of the written memorandum accompanying the deposit. Those terms were, that in case they should sell the paper for their own reimbursement, they should render the surplus of the proceeds to *Palmer* and Co., not that the surplus of the proceeds should be a security against any prior or subsequent advances. It is quite clear that it could not have been the intention of the parties at the date of the agreement of the 12th *November* 1829, that the deposit of the Company's paper was to secure the payment of the two notes which the bank had previously discounted

---

[*] 1 Turn. 274.

[†] 19 Ves. 209.

[‡] 2 Rose 239.

[§] 1 Glyn & Jameson, 409.

[||] 1 Deacon & Chitty, 407.

1836.

YOUNG
v.
BANK OF
BENGAL.

for *Palmer* and Co.; for if that had been so, the bank would have taken care to have had a stipulation to that effect inserted in the agreement, which is wholly silent as to any prior advances.

In whatever light, then, we view the transaction between these parties, the bank could have no lien on the securities deposited by *Palmer* and Co., nor have they now any set-off against the surplus of the proceeds arising from the sale of them, in respect of the two promissory notes. The transaction was not within the clause of mutual credit in the Bankrupt Act: first, because it was a deposit for a specific purpose, which would not necessarily terminate in a debt; secondly, because it was an unexecuted trust at the time of the insolvency of *Palmer* and Co., and the commissioners could not therefore take the account and state the balance between the parties, pursuant to the directions of the 6th *Geo.* IV, c. 16, s. 50; thirdly, because no credit within the meaning of that section was given to the bank by *Palmer* and Co. before their insolvency; and fourthly, because a party cannot avail himself of a right of set-off under the clause of mutual credit, contrary to his own express agreement. Moreover, if the transaction is considered as an equitable mortgage, it must be governed by the same rules which regulate that species of security; and these are express, that an agreement accompanying the deposit of a pledge as a security for money borrowed, cannot be extended or enlarged unless by positive agreement, and therefore cannot be made to cover either prior or subsequent advances. The respondents have chosen their own security; they have already, by virtue of this security, recouped themselves the whole amount of the loan of the 103,900 rupees, which they made to *Palmer* and Co. on the

12th *November* 1829, as well as the whole amount of the five subsequent loans, and they ought not to be permitted, by a forced and extended construction of the clause of mutual credit, to draw within their grasp still more of the property of these insolvents; which it was clearly the intention of the legislature, both in the *English* Bankrupt Act and *Indian* Insolvent Act, should be distributed equally among all the creditors. The Court too will not fail to remember, if they have any doubt in the construction of this clause, that there is an express direction in the *English* statute, " that the Act shall be construed beneficially for creditors," generally, and not for the preference of an individual creditor, to the detriment of the general creditors of the bankrupt.

The Attorney-General and Mr. *Maule*, K.C., for the respondents.

We contend that this is a case of mutual credit within the meaning both of the 36th section of the *Indian* Insolvent Act, 9 *Geo.* IV, c. 7, and of the *English* Bankrupt Act, 6 *Geo.* IV, c. 16, s. 50. In the first place, we must take for granted that both these statutes are to be interpreted in the same way, as to the right of set-off; for the 36th section of the *Indian* Act expressly says, that debts may be set off as well as proved, " in the same manner and subject to the like deductions, conditions, and provisions as prescribed in the *English* Bankrupt Act."

[The Court here intimated that they were satisfied on this point, namely, that the same interpretation as to the right of set-off ought to govern both the *English* and the *Indian* Act.]

That point being disposed of, we are now to consider what is meant by the 50th section of the *English* Bankrupt Act, which provides, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person," one debt or demand may be set against another. The term "mutual credit" comprehends a great deal: taken in its largest sense, it would mean any sort of confidence, which two men might happen reciprocally to repose in each other. But we admit that the construction of the term must be confined to pecuniary credit, that is, where there has been money, or money's worth, entrusted by either party to the other; then the commissioners shall state the account, and one debt or demand may be set off against another, and the balance only on either side can be claimed or paid. We do not mean to contend, that where goods, as securities, have been deposited by a bankrupt for a particular purpose, and the depository has been guilty of a fraud, or of a breach of trust, which amounts to a fraud, in the disposal of the property, that he can avail himself of the clause of mutual credit, in answer to the claim of the bankrupt's assignees. But where a party has, in the course of his dealings with a bankrupt, and without any fraud or breach of trust on his part, got money belonging to the bankrupt honestly in his hands, we say, it was the intention of the statute, that the account between them should be taken by the commissioners, and the balance only due on such account be paid by one party to the other. We deny the construction contended for by the appellants, that there must be mutual debts of the bankrupt, and the party claiming the set-off, existing at the time of the bankruptcy, in order to bring a case within the clause of mutual credit. We say it is sufficient if there has been mutual credit which was likely to terminate in a debt from one party to the other, without any regard to the question, whether the debt accrued before the time of the bankruptcy, or in the time of the assignees; and that when the transactions of the mutual credit have resulted in cross demands, there ought to be a right of set-off. This is a principle that is founded on natural justice and equity: and it would be most unjust to hold that the bankrupt should be compelled to return, *in solido,* the surplus of the proceeds arising from the sale of the Company's paper, when there is another debt due to them from *Palmer* and Co.

Now, what is the true state of the case, as to the dealings between these parties? The bank of *Bengal* accommodate *Palmer* and Co. with a loan of 103,900 sicca rupees; to secure the repayment of which, *Palmer* and Co. deposit with the bank Company's paper to the amount of 113,000 rupees, with an express authority to the bank, that if *Palmer* and Co. make default in the repayment of the loan at the end of three months, then the bank might absolutely sell or dispose of the Company's paper for its own reimbursement, rendering to *Palmer* and Co. any eventual surplus. We utterly deny that there was any undertaking here, either expressed or implied, like that in some of the cases referred to, that the bank would not apply that surplus in the payment of any other debt that might be due from *Palmer* and Co. to the bank. In none of the cases that have been cited by the other side, was there any power given to the depository to sell or dispose of the thing deposited; but here there is an express power of sale given to the bank, in case default should be made by *Palmer* and Co. in the re-

1836.
YOUNG
v.
BANK OF
BENGAL.

payment of the loan; and the bank did not, in fact, dispose of the Company's paper until after such default were made by *Palmer* and Co. There is, then, a clear case of a sale, and of the possession of the proceeds of the sale, without any breach of trust. *Palmer* and Co. had confidence in the integrity of the bank of *Bengal,* and the bank trusted *Palmer* and Co. with the amount of the loan. It makes no difference in the case, that the assignees might have redeemed the Company's paper by paying off the amount of the loan before the expiration of the three months. If *Palmer* and Co. had continued solvent, and had brought an action against the bank for the amount of the surplus arising from the sale of the Company's paper, could not the bank set off the amount of any other debt that might be due to them from *Palmer* and Co.? How can their assignees, then, be in a better situation? Assignees, it is true, take all the interest of the bankrupt, but they take nothing more; they are subject to any charge on it to which the bankrupt himself was liable. If the assignees, then, in this case did not think proper to redeem the securities, before the bank sold them, pursuant to the authority given by *Palmer* and Co., the right of set-off would attach, in the same way as if there had been no brankruptcy or insolvency. In every case of lien, the depository possesses the same right against the assignees as against the bankrupt himself.

[Mr. Baron PARKE: You contend, then, that the right of set-off in this case depended on the conduct of the assignees, whether they paid off the loan before the three months, or not?]

Our position is, that where a man, entrusted with property by another, gets money fairly and honestly in his hands, in the performance of his trust, he has a

1836.
YOUNG
v.
BANK OF
BENGAL.

right to set off against this sum, a debt owing to him from the party who trusted him with the possession of such property. The assignees here are not to place themselves in two situations ; they are not to blow hot and cold ; they must either redeem before forfeiture, or be subject to the right of set-off of the bank. Suppose a man entrusts his creditors with a bag of money, could he recover back the amount, without permitting the creditor to set off his own debt ? The clause of mutual credit in the Bankrupt Act is merely a statutory exposition of what was the common law when the statute was enacted, and was not meant to abridge, or curtail the right of set-off that previously existed independent of that statute.

The case of *Olive* v. *Smith** is on all fours with the present. There the bankrupts had trusted the defendants with the possession of goods and of policies of insurance, and the defendants had trusted the bankrupts with the money advanced, and the premiums paid for them on the policies. So here *Palmer* and Co. entrusted the bank with the possession of the Company's paper, and the bank trusted *Palmer* and Co. with the loan of the 103,900 sicca rupees. And Lord Chief Justice *Gibbs* lays down the law expressly in that case, that wherever each party has trusted the other with the possession of value, the assignees of either party, in case of his bankruptcy, cannot withdraw that value from the others, but on the terms of paying what is due between them.

The cases relating to equitable mortgages, which have been cited by the other side, do not apply to the present. In no case of equitable mortgage is there a power of sale given to the depository of the thing de-

---

* 5 Taunt. 56.

1836.
YOUNG
v.
BANK OF
BENGAL.

posited; there is nothing there but a mere naked pledge, to be retained in the hands of the depository. In this case there was not only a power of sale given of the thing deposited, but the power has been lawfully exercised by the party to whom it was given. The present case, therefore, is not to be assimilated to one of an equitable mortgage, but is to be considered as one of a legal mortgage, where the mortgage-deed gives a power of sale to the mortgagee.

[Mr. Baron PARKE: Supposing the assignees had in this case tendered the amount of the principal and interest due from *Palmer* and Co. to the bank, before an actual sale of the Company's paper, what do you say would then have been the right of the bank?]

In that case, if the money was not tendered until after the expiration of the three months, we should still contend that the account must be taken of what was due from one party or the other, and only the actual balance paid.

[Mr. Baron PARKE: So that there again, you would make the set-off depend entirely on the act of the assignees. But is this to deprive the rest of a bankrupt's creditors of their rights at the time of his bankruptcy?]

The rest of a bankrupt's creditors are in many cases bound by the acts of the assignees. Supposing the assignees had been the indorsees of a bill of exchange drawn by the bank of *Bengal,* which was dishonoured when due, and the assignees had not given notice of the dishonour to the bank, the bank would in that case have been discharged from the payment of the bill by the neglect of the assignees, and the rest of the creditors would be bound by their default.

[Mr. Baron PARKE: Supposing that *Palmer* and

1836.
YOUNG
v.
BANK OF
BENGAL.

Co. had, before their insolvency, assigned their interest in the Company's paper to another person, do you contend that the bank would then have a right of set-off against such third person ?]

We submit that they would ; as the assignee in such case would equally represent *Palmer* and Co., and be as subject to all their liabilities as the assignees of a bankrupt are subject to his liabilities.

[Mr. Baron PARKE : I think not. Although assignees of a bankrupt represent the bankrupt for some purposes, they are not bound by his liabilities. The only burthen which the law imposes on them is, to collect the bankrupt's property, and distribute it amongst the creditors.]

However that may be, we say, that there is no case to be found in which it has been held, that a party, with whom goods or securities have been pledged by a bankrupt, with a power of sale, has not a right of set-off against the assignees, after the sale has been effected, in respect of the proceeds of the sale. It is not necessary that the transaction between two parties must end in a debt, in order to give a right of set-off ; it is sufficient if it may terminate in one, or form a pecuniary item in the account between them. This was determined in the case of *Gibson* v. *Bell*,* which has been already cited. That was an action for unliquidated damages against the defendant, for not accepting a bill of exchange, according to a special agreement entered into between the defendant and the bankrupt ; and it was held that the defendant might set off a debt due to him from the bankrupt for money lent. In giving his judgment in that case, the Chief

---

* 1 Bing. N. C. 743.

Justice observed, that "the principle which the bankrupt laws seem to have had in view, from the earliest time to the last provisions made therein, is this,—that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side." And in a subsequent part of his judgment he adds, "that from the earliest practice to the latest provision by statute, the object seems to have been, that the account should be stated as between merchant and merchant, and that whatever would be, in ordinary practice, a pecuniary item in such account, should be the subject of set-off." In alluding to the case of *Rose* v. *Hart,** which was there cited, as in this case, against the right of set-off, the Chief Justice says, "It is observable, that in giving judgment in that case, Lord Chief Justice *Gibbs* states the law of the set-off to depend upon the enactment in the 5th *Geo.* II, c. 30, s. 28, and lays great stress upon the circumstance, that it is enacted merely in the final words of the clause, 'that one debt shall be set against another.' But, in point of fact, the law of set-off at that time was governed, not by the 5th *Geo.* II only, but also by the 46th *Geo.* III, c. 135, s. 3, by which latter statute it was enacted, 'that one debt or demand' may be set off against another; and it is difficult to see for what purpose such latter words can have been introduced, and have been since continued in the 50th section of the last Bankrupt Act, except for the purpose of giving a greater latitude than the strict meaning of the word 'debt' would of itself import." The result of the case of *Gibson* v. *Bell*

---

* 8 Taunt. 499.

1836.

YOUNG
v.
BANK OF
BENGAL.

shows clearly, therefore, that the subject of set-off extends to every thing that may end in a pecuniary transaction ; that is, to whatever may form a pecuniary item in the account : and it confirms the decision in *Olive* v. *Smith,*[*] namely, that if a person entrusted with value trusts his creditor with that which may become productive of value, and afterwards becomes bankrupt, the creditor may retain his debt out of the proceeds of the thing entrusted to him, and only pay the balance ; it being a case of mutual credit, within the provisions of the Bankrupt Act.

With respect to the case of *Buchanan* v. *Findlay,*[†] which has been relied on by the other side, Lord *Tenterden* dwells on the distinction in that case, that the defendant was a wrong-doer by not fulfilling the directions of the bankrupt, and procuring the bills to be discounted ; and it was on that ground that he decided against the set-off. But where the party is not a wrong-doer, the right of set-off is let in, notwithstanding an actual contract to pay over the money, as in *M'Gillivray* v. *Simpson.*[‡] That was an action by the assignees of a bankrupt against a broker to recover the amount of the proceeds arising from the sale of a quantity of timber, which the bankrupt had employed the defendant, as a broker, to sell upon commission. It appeared that the defendant, in consideration of being so employed by the bankrupt, had agreed to account for and pay over to him the proceeds of the sale, without deducting therefrom a debt then due to him from the bankrupt. The defendant sold the timber, and rendered an account ; in which, however, he deducted the debt due to himself from the amount of the proceeds, and claimed a right to set off that debt in the action brought by the assignees. And it was held by the Court of King's Bench, that the agreement of the defendant was not binding on him, so as to deprive him of his legal right of lien or set-off.

---

[*] 5 Taunt. 56.

[†] 9 Barn. & Cress. 738.

[‡] 9 Dowl. & Ry. 35 ; 9 Barn. & Cress. 746, *note* (c).

[Lord BROUGHAM: Do you cite this case, Mr. Attorney, to show that the defendant was not a wrong-doer, and therefore entitled to insist upon his set-off? That would be rather an illogical conclusion from the premises, as you have stated them from the case.]

[Mr. Baron PARKE: It is certainly an extraordinary decision; I must say it is altogether a very odd case.]

There is another case, however, which is not open to these objections, and that is *Easum* v. *Cato*,* which we rely on as a very strong authority in favour of the right of set-off in the present case. The facts there were as follow: The bankrupts being indebted to the defendant in a large amount, and being desirous to make a shipment of goods to *Rio de Janeiro* on their own account and risk, but not in their own names, represented to the merchants, through whom the shipment was to be made, that the goods were the property of the defendant, and shipped on his account; and the defendant accordingly, by the desire of the bankrupts, wrote to the merchants, stating the fact to be so, and directing them to insure, and to advance money to the bankrupts on the goods, which was done. After the issuing of the commission, the returns for the shipment came home to the merchants, who paid part of the proceeds to the defendant; and the action

---

* 5 Barn. & Ald. 861.

1836.
YOUNG
v.
BANK OF
BENGAL.

was brought by the assignees to recover what had been thus paid over to the defendant. Upon these facts the Court of King's Bench held, that this was a credit given to the defendants by the bankrupts, by the delivery of goods, in its nature likely to terminate in a debt ; that the defendant was entitled to recover the proceeds of the shipment from the merchants, and to set off against the proceeds the amount of the debt due to him from the bankrupts, it being a case of mutual credit within the 5th *Geo.* II, c. 30, s. 28. This case plainly shows that the Courts are anxious, as far as they can, to extend the right of set-off given by the Bankrupt Acts ; for there the goods were not even in the actual possession of the party claiming the set-off, but had only been constructively delivered to the defendant by the bankrupts. And although Lord Chief Justice *Gibbs* said in *Rose* v. *Hart*,* he thought that the transaction must terminate in a debt to give the right of set-off, yet we may oppose to this what Mr. Justice *Bayley* says in *Easum* v. *Cato*, namely, that a case is within the class of mutual credit, when it is "likely to terminate ultimately in a pecuniary balance on the one side or the other."

Sir *William Follett* in reply :

It seems a strange argument that has been advanced on behalf of the respondents, to say that the right of the bank to set-off, claimed in this case, depended upon something to be done by the assignees, after the bankruptcy or insolvency of *Palmer* and Co. They admit, on the other side, that if the assignees had paid off the loan, and redeemed the Company's paper,

---

* 8 Taunt. 499.

1836.

YOUNG *v.* BANK OF BENGAL.

before the three months had expired, the bank would then have had no right of set-off; but then they contend, that, as the asignees have not thought proper to do so, the right of set-off has accrued from their default. I say that this is a loan of money on a deposit of securities for a specific purpose, and that it must be governed by the terms of the contract, and by nothing else. Again, they argue on the other side, that it is unjust that the bank of *Bengal* should be compelled to return, *in solido,* the surplus of the proceeds of the Company's paper, when there is another debt due to the bank from *Palmer* and Co. But where is the injustice? The injustice would be to the general creditors of *Palmer* and Co., if the bank, after indemnifying itself in full for the amount of the several loans due from the insolvents, were to sweep away the remainder of the effects in satisfaction of other debts, while the rest of the creditors when wholly unpaid; the bank, in breach of their contract to restore the surplus of the proceeds to *Palmer* and Co., now claiming to apply that surplus in the payment of the two notes which they previously discounted for the insolvents, without looking to any other security for the repayment of the money in this discount transaction, than the notes themselves The respondents contend, that this is a case of mutual credit between the bank and *Palmer* and Co.; but when is the credit to attach, and what was the credit given by *Palmer* and Co. to the bank? The Attorney-General says, that *Palmer* and Co. placed confidence in the bank, that they would not sell the Company's paper, deposited with them, before default was made by *Palmer* and Co. in the payment of the 103,900 sicca rupees; that is, that the bank would not commit a fraud, and make free with property deposited with it for a special purpose. And in order to illustrate a case of lien, or mutual credit, the Attorney-General has put the instance of a party being entrusted with a bag of money to keep for another man, contending, that he would have a right to help himself to the contents for the satisfaction of his own debt. But, with all due respect to the Attorney-General's law on this subject, I cannot help thinking, that the depository would be placed in rather an awkward situation before a court of criminal jurisdiction, if he forced open the box or the bag, whichever it might be, and subtracted the contents, in violation of his trust. The Attorney-General has admitted, that he does not rely on the case of *Ex parte Deeze.* I was glad to hear that; for the case on which they chiefly do rely, on the other side,—I mean the case of *Olive* v. *Smith,*—is founded entirely on *Ex parte Deeze,* which is equally dwelt upon in the argument of the counsel, and the judgment of Lord Chief Justice *Gibbs.*. It is clear from some of the authorities which have been cited, that there may be cases of mutual credit which are not cases of mutual debt; but that, according to the better opinion of Lord Chief Justice *Gibbs,* which has been recognized in many subsequent cases, the credit meant by the statute is such a credit as must necessarily terminate in a debt. It is equally clear, from the decision of the Court of Common Pleas in the recent case of *Hewison* v. *Guthrie,*[*] that there must be a mutual credit existing at the time of the bankruptcy, and that the balance claimed must be a balance due also at the time of the bankruptcy. In what position, then, do the parties in this case stand at the time of the insolvency of *Palmer* and Co.? The insolvency took place on the 4th *January* 1830; no default had been then made, until three months after the date of the agreement of the 12th *November* 1829; the bank, therefore, would have no right to sell the Company's paper before the 12th *February*; and the assignees of *Palmer* and Co. would at any time, before the last-mentioned day, have the right to redeem the Company's paper. There was, therefore, not only no debt owing from the bank to *Palmer* and Co. at the time of their insolvency, but no credit that would necessarily terminate in a debt. It has been said, that if *Palmer* and Co. had continued solvent, and paid off the loan, would not the bank then have had a right to set off the amount of the two notes? Possibly they might have been so entitled. But, in the present case, the rights of the general creditors intervene, and these are not to be defeated by any *ex post facto* account that may arise between the assignees and the bank. In *Adams* v. *Claxton*,* it was decided, that where a party had an assignment from an insolvent of a policy of insurance to secure the sum of £1000, and had not received the money on the policy before the insolvency, he had no right to retain, beyond the £1000, so much of the money as would pay him a subsequent debt upon a note of hand. The Master of the Rolls there said, that the party was merely a mortgagee for the £1000; and that it was clearly settled, that, in the case of a mortgage, the right to attach a subsequent debt cannot be made available against an assignee of the equity of redemption. So in the present case, the bank of *Bengal* were merely mortgagees for the 103,900 sicca rupees; and as this sum was not only not received, but not receivable, at the period of *Palmer* and Co.'s insolvency, the bank had no right to tack the amount of the two notes to the security they held, as against the assignees and general creditors of *Palmer* and Co.

---

[*] 2 Bing. N. C. 755.

---

* 6 Ves. 226.

They have contended on the other side, that the cases relating to equitable mortgages do not apply to this, because, in those cases, there is no power of sale given to the mortgagee. But suppose a legal mortgage, with a power of sale, and the mortgage is not forfeited, nor the sale effected until after the bankruptcy of the mortgagor; can it be contended that the mortgagee in such case, besides paying himself off the principal and interest due on the mortgage, would have a right, as against the general creditors of the mortgagor, to retain the surplus in satisfaction of another debt, which the mortgage was never intended to secure? It is clear, that in such case the mortgagee must return the surplus to the assignees of the mortgagor, for the benefit of the general creditors, and come in with them as a creditor under the commission, in respect to his other debt. It is impossible to contend that the surplus of the produce of the sale in that case would be subject to set-off. In the present case there is, no doubt, a power of sale after default; but it is not distinguishable from the instance put of a mortgage of real property. The decision in *Ex parte Flint*,* it is submitted, applies strongly to this case; there, certainly, the money was not received on the bill of exchange, which the petitioner contended was subject to his right of set-off; but the grounds of Lord *Eldon's*

---

* 1 Swanst. 30.

1836. YOUNG *v.* BANK OF BENGAL.

judgment were, that the petitioner had no right to consider the bill as an *item* of mutual credit, to be brought into the account between him and the bankrupts, having received it under a contract of such a nature that it would be contrary to natural equity to make the use which he sought to make of it, by availing himself of the statute. The case of *M'Gillivray* v. *Simpson,*[*] which has been cited by the other side, it seems to be admitted, is no very great authority; nor is there any case to be found which decides that the account directed to be taken under the 50th section of the Bankrupt Act, of the mutual debts and credits subsisting between the bankrupt and any person, is to be taken at any period subsequent to the bankruptcy or the date of the commission.

Lord Brougham :

16 December. This was an appeal from the judgment of the Supreme Court of *Calcutta,* in an action brought by the assignees of *Palmer* and Co. against the bank of *Bengal,* in which a verdict had been taken by consent, subject to the opinion of the Court on a special case.

The case stated, that *Palmer* and Co. had been in the habit of obtaining loans from the bank, on the deposit of Company's negotiable paper, as well as on the discount of their own and other securities : that in the month of *November* 1829, *Palmer* and Co. obtained in this way six several loans from the bank, amounting in the whole to 417,000 sicca rupees, depositing Company's paper to the amount of 460,000 sicca rupees; and giving their own promissory notes,

---

[*] 9 Dowl. & Ry. 35.

1836.

YOUNG
v.
BANK OF
BENGAL.

at three months date, for the sums thus advanced by the bank. By these six several promissory notes *Palmer* and Co. engaged to pay the several sums advanced with interest, and each note contained a further statement, that so much Company's paper had been deposited as a collateral security, with an authority to the bank to sell the paper deposited for the reimbursement of the bank, at the expiration of the three months credit, rendering to *Palmer* and Co. any surplus arising from such sale, and with an undertaking of *Palmer* and Co. to make good any deficiency, and to pay 12 per cent. interest from the expiration of the credit, until the debt should be discharged, or the paper be sold. The several credits expired in *February* 1830; the first on the 15th of that month, the last on the 28th; and on the 4th *January*, while the whole of the loans remained unpaid, and the whole of the deposits were in the hands of the bank unsold, *Palmer* and Co. were adjudged insolvent under the 9th *Geo.* IV, c. 73, and the plaintiffs were appointed assignees of their estate and effects. At the same period, the 4th *January*, the bank held two promissory notes of *Palmer* and Co., at three months date, for 40,000 and 60,000 sicca rupees, payable, the former the 24th *January*, and the latter the 7th *February* 1830. These notes the bank held as indorsees for value, *Palmer* and Co. having discounted them with the bank in the ordinary course of business, and before the first of the six loans, *viz.* on the 21st *October* and the 4th *November* 1829.

None of the loans being paid by the insolvents or their assignees, the bank proceeded to sell the paper deposited, according to the terms of the agreements, and there remained a surplus upon the six sales of

30,176r. 10a. 8p. after paying off the several loans with the interest stipulated. For this sum, with interest at 6 per cent. after the dates of the several sales, the action was brought. The bank sought to set off the sum due upon the two promissory notes, which they held as indorsees for value, and which remained unpaid, against this surplus of the deposits made upon the subsequent loans ; and the Court, on the case reserved, being of opinion that this set-off was competent to the bank, gave judgment for the defendants, which was entered up on the 29th *August* 1833, and is now brought before this Court by appeal.

The Act under which the proceedings were had upon *Palmer* and Co.'s insolvency, (9th *Geo.* IV, c. 73,) contains a provision (s. 36) similar to the 56th section of the *English* Act, (6th *Geo.* IV, c. 16,) touching mutual debts and credits; and although there are some words of the latter omitted, particularly those respecting "mutual debts between the parties," and those requiring the commissioners "to state the account between them," yet as there is a very general declaration that "all such debts due, and claims as may be proved under a commission of bankruptcy according to the Act of the 6th *Geo.* IV, may also be proved in a proceeding under this Act, in the same manner, and subject to the like deductions, conditions, and provisions as in the 6th *Geo.* IV are set forth and prescribed." It is manifest that the proceedings are entirely assimilated, that the difference in the preceding portion of the section is immaterial, and that the present question is to be dealt with and disposed of exactly as if it had arisen in a proceeding in bankruptcy under the *English* Act.

It is equally clear that in this case the question turns upon the right of set-off given by the statute which extended the set-off recognized by the common law. (Anon. 1 Mod. 215. *Peters* v. *Soame,* 2 Vernon, 428.) But for that extension it never could be contended that the bank had a lien upon the securities deposited beyond the amount of the money advanced upon the credit of those securities; since even in the most favourable view which could be taken,—that of the bank being *Palmer* and Co.'s bankers,—the lien for the general balance of the customers' account would in this case be restricted by the circumstances in which the deposit was made. This is clearly admitted in *Davis* v. *Bowsher,* (5 T. R. 488,) where the general lien of bankers was perhaps first distinctly ascertained. Nor can it be said that the debt due by *Palmer* and Co. on the promissory notes discounted, had any connexion with their deposit of the securities; for that debt was contracted before those securities were deposited, and the bank could not have had them in contemplation when it discounted the notes.

The claim of the bank is accordingly rested upon the 50th section of the Bankrupt Act, which is taken from the 28th section of the 5th *Geo.* II, c. 30, with such additions as were supposed necessary for enabling contingent debts to be set off, since these were by the new Act made proveable. Every debt or demand made proveable by the Act against the estate of the bankrupt may, by this 50th section, be set off "against such estate," that is, against any debt or demand of the bankrupt's estate. But the former provision is retained, with the addition of the word "*demand,*" taken from the 46th *Geo.* III, namely, that where mutual credit has been given by the bankrupt and any other person, or where there are mutual debts between the

1836

YOUNG
v.
BANK OF
BENGAL.

bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, and the balance only be claimed or paid on either side.

The question, then, is, whether or not there were mutual credits or mutual debts between the parties to the transaction now under consideration? That there was both a debt from *Palmer* and Co. to the bank, and a credit from the bank to them is undeniable. The Company were both previously indebted on their notes discounted, and by the money advanced on the deposits. But that is not enough, unless either the bank was indebted to them, or they had given the bank credit. The only question, then, is, had *Palmer* and Co., or had they not, given the bank credit before the bankruptcy within the meaning of the Act? In other words, was the deposit of the negotiable paper, with the power to sell and pay over the surplus in case the advance made on it should not be repaid, a credit given to the bank by *Palmer* and Co.? If it was a credit we may further observe that it was so only to the extent of the surplus, for as far as regarded the monies advanced, to secure which the deposit was made, that deposit was only *in presenti* a bailment, and even *in futuro* a payment, of *Palmer* and Co.'s debt to the bank. The question is, whether or not the deposit, *quoad* the *overplus,* amounted to a credit given; whether or not *Palmer* and Co., giving the bank a power to possess itself of the surplus, after repaying its own debt, when that debt should become due, can be said to be a giving credit to the bank?

Now although, generally speaking, debt and credit are correlative terms, and A. giving credit to B. may seem to imply that B. is indebted to A., yet it may be admitted that the introduction of the words "mutual credit" extends the right of set-off to cases where the party receiving the credit is not debtor *in presenti* to him who gives the credit. Accordingly the relation, contemplated by the statute, has been held to be established where the debt is immediately due from the one party, and only due at a future day from the other. It was so held in *Ex parte Prescott,* (1 Atk. 230,) where the mutual credit was constituted by simple contract debts presently due on the one side, and a specialty debt not due on the other : *Smith* v. *Hodson,* (4 T. R. 211,) *Hankey* v. *Smith,* (3 T. R. 507,) and many other cases, affirm the same doctrine. But in none of those cases was there any uncertainty, as to the party said to receive the credit becoming sooner or later debtor *in presenti* to the other; in none of them did the existence of the relation of debtor and creditor, depend upon the pleasure of one party; in all of them the party said to have given the credit had placed the other party in a situation which he himself could not alter, had given him funds of which he could not dispossess him, or, which is the same thing, a power over funds which he could not revoke.

The case is materially different where one of the parties has actually become indebted to the other, and can only cease to be so by paying the debt, but the other has only acquired a power which may end in making him debtor or not, according as the donor of the power pleases. A. is indebted to B., and B. is neither actually indebted to A. nor under any liability which must needs end in his being A.'s debtor, but has only been entrusted with a power over A.'s funds, to be executed at a future time if A. pleases; but, if A. thinks proper, never to be executed at all. Admitting that

1836.
YOUNG
v.
BANK OF
BENGAL.

in the event of A. never revoking the power, a debt will arise, the existence of that debt is defeasable; the only certainty is that A., in order to revoke the power, must do an act wholly unconnected with giving B. any credit, namely, discharge a debt due to B. Now it is not denied that *Palmer* and Co. could at any time have prevented the bank from ever receiving the surplus—in respect of the possibility of which surplus arising, the credit is supposed to have been given. By repaying the monies advanced, they could regain possession of the deposit, and the power of sale was determined without any consent of the pawnee.

Again : not only did the existence of any debt at any time depend upon the depositor, but he had no such debt as could have been proved under a commission against the pawnee. The words, and every " debt or demand *hereby made proveable,*" added to the recent Act, for the purpose of including contingent debts, show that debts, in order to be set off, are supposed proveable, which indeed appears to follow from the nature of the case. Suppose the bank of *Bengal* had been made bankrupt before selling the paper; it is clear that *Palmer* and Co. could not have proved against their estate for the contingent surplus. The paper was deposited to answer a specific purpose; and if any use had been made of it, inconsistent with the terms of the deposit, the pawnee would have committed an offence; a breach of trust, certainly a transportable misdemeanour, if the Banker's Act (52nd *Geo.* III c. 63,*) extends to *Bengal.* But unless the power of sale was executed by the pawnee, (in which case he

---

* Repealed by 7 & 8 *Geo.* IV, c. 27 ; but its provisions are re-enacted by 7 & 8 *Geo.* IV, c. 29, s. 49.

1836.

YOUNG
v.
BANK OF
BENGAL.

became the debtor at once,) he never could be said to have "contracted a debt," either present or contingent, to the pawnor, and consequently the pawnor could make no proof.

Next it must be observed, that though the question is on the statute, and though the statutory right of set-off extends the right known to the common law, yet the common-law principle of mutuality, which is of the essence of set-off, must prevail; and if the deposit, or rather its surplus, could not be set off against the demand of the pawnee, so neither shall the pawnor's debt be set off against the surplus. Lord *Hardwicke* appears to have mainly proceeded on this view in *Ex parte Ockenden.* (1 Atk. 235.) Could the miller, he asks, have refused to deliver up the corn in an action at the corn-factor's instance, by claiming to set off a debt due, unconnected with the deposit? And, *vice versa,* could the corn-factor have set off the value of the corn, in an action by the miller, for money lent at a former time? Holding that both questions must be answered in the negative, he considers this as decisive against the miller's right to set off the debt antecedently due from the pawnor. And Lord *Mansfield,* in giving the judgment of the Court of King's Bench some years after, in *Green* v. *Farmer,* (in 4 Burrow, 2224,) after reading his own note of *Ex parte Ockenden,* observes, that Lord *Hardwicke* thought he could not construe a dealing to be within the mutual-credit clause of the Bankrupt Act, unless it could be so construed in an action of trover; and adds, "*That is certainly so.*" But if the same test be applied to the present case there is an end of the question. For, first, no one contends, that had *Palmer* and Co. repaid the monies advanced on the deposit, the bank could

1836.
YOUNG
v.
BANK OF
BENGAL.

have retained the paper for their antecedent debt, which is one of the points made by Lord *Hardwicke*; and next, had the bank brought their action upon the notes, which they held as indorsees, it is manifest that *Palmer* and Co. never could have set off the surplus which might arise from the ale of the paper deposited, which is the second of Lord *Hardwicke's* points.

No doubt the case would have been altogether different had the bank actually sold the paper, and received the surplus prior to the bankruptcy; for then they would have been debtors in that amount to *Palmer* and Co., and the case would have been one of mutual debts. Supposing the notes discounted then due ; or supposing them not yet due, it would have been a case of credit given to *Palmer* and Co. by them, and of debt due from them to *Palmer* and Co., and so clearly within the statute. This is the case of *Atkinson* v. *Elliott,* (in 7 T. R. 378,) but is wholly different from the case at bar.

There is nothing inconsistent with what has now been advanced in the decision in the language used by the Court of Common Pleas in the case of *Rose* v. *Hart,* (8 Taunt. 499,) where the former case of *Olive* v. *Smith,* (5 Taunt. 56,) was reconsidered, and a material qualification added to the generality of the doctrine which had there been laid down. In *Olive* v. *Smith* a broker had been allowed to set off a debt antecedently due from his employer, against the losses recovered from the underwriters on policies deposited in his hands. In *Rose* v. *Hart,* the Court held that such a set-off is only competent to the pawnee in cases where the thing alleged to be a giving of credit either constitutes a present cross debt, or must end in one. This limitation of the case of *Olive* v. *Smith* has, in subsequent cases, been approved and followed : *Sampson* v. *Burton;* (2 Brod. and Bing. 89;) *Rose* v. *Sims ;* (1 Barn. and Adol. 521;) and although the Court, in *Easum* v. *Cato,* (5 Barn. and Adol. 861,) appeared to hold that it was enough if the transaction would most likely terminate in a debt, yet it is to be remarked, that the argument went entirely upon other grounds, and the decision cannot justly be said to have relaxed the restriction scope of Lord *Mansfield's* observation in *French* v. *Hart,* qualified its former opinion.

If it be admitted that there can arise no right of set-off in respect of mutual credit unless the dealing be, at the time of the bankruptcy, such as must necessarily and at all events terminate in creating the relation of debtor and creditor between the parties, then is the present case out of that rule, and the bank's claim of set-off defeated. Nor will the reversal of the judgment below be found repugnant to any of the cases except *Ex parte Deeze,* (1 Atk. 228,) and *Olive* v. *Smith,* of which the latter appears to have proceeded almost, if not altogether, upon the authority of the former, not to mention that it falls in some manner within the scope of Lord *Mansfield's* observation in *French* v. *Fenn,* to be afterwards cited.

It is impossible to regard *Ex parte Deeze* as resting on the ground upon which the report in *Atkyns* places it. And although Lord *Mansfield,* in *Green* v. *Farmer,* seems to vouch for the accuracy of that report, as well as of the report in the same book of *Ex parte Ockenden,* he nevertheless refers to Lord *Hardwicke's* statement in the latter case, that in the former there had been some evidence of a usage; and gives it as the result of his own inquiry respecting *Ex parte*

1836.

YOUNG
v.
BANK OF
BENGAL.

Deeze, that the packer (the pawnee) was, by the usage, in the nature of a factor : a reference which we have made to Lord *Hardwicke's* original note books has confirmed this statement, that the point of usage was made, and evidence adduced respecting it. From hence, and from Lord *Hardwicke's* subsequent decision in *Ex parte Ockenden,* as well as from what has been said, both in the Common Pleas in *King* v. *Flint,* (8 Taunton, 21,) and by Lord *Eldon* in *Ex parte Flint,* (1 Swan. 30,) it may be considered that *Ex parte Deeze* is no longer law, as reported in *Atkyns ;* and that but for a special custom giving the pawnee a general lien, the mere deposit, whether of goods or of securities, for a particular purpose, as it certainly will not constitute the pawnee a debtor, so it will not amount to a giving of credit at all, unless coupled with an authority given to the pawnee of selling them; such power being given absolutely and not countermandable. But it is equally certain that *Olive* v. *Smith* was decided upon the assumption that *Ex parte Deeze* is a binding authority; and when we find that the language of the Court, in *Rose* v. *Hart,* so materially varies and narrows the principle which had been the guide in the former decision, and that the case itself is disposed of in a way not easily reconcileable with *Olive* v. *Smith,* and in no way whatever reconcileable with the report of *Ex parte Deeze,* upon which *Olive* v. *Smith* had been grounded, and that the view now taken may be reconciled with the latter, and more correct, or rather more authentic, opinions of Lord *Hardwicke,* and with the latter and more correct opinions of the Court of Common Pleas, there seems to be no good reason for supporting a claim which is both at variance with principle and runs counter to a greater weight of

1836.

YOUNG
v.
BANK OF
BENGAL.

authority than can be produced in support of it. With respect to the case of *Parker* v. *Carter,* (1 Cook, Bankrupt Law, 548,) it may be observed, that the defendants rested their title to set-off upon a lien which they claimed to have "as general agents" of the bankrupt; and the report of the case in *Cook's* Bankrupt Law gives this as the ground of the decision in their favour. Lord Chief Justice *Gibbs,* in *Olive* v. *Smith,* though, on the granting of the rule *nisi,* he states *Parker* v. *Carter* as a case of mutual credit, yet afterwards, the particulars having been inquired into, seems to admit that it was a case of lien, (5 Taunt. p. 65,) and accordingly he rests his judgment mainly upon *Ex parte Deeze,* and mentions also *Ex parte Boyle,* (1 Cook, Bankrupt Law, 561,) and *French* v. *Fenn.*

Ex parte Boyle was the case of a client who owed a sum to his solicitor for work done and money lent, and who gave the solicitor, by way of loan, his notes of hand to a larger amount—part of which notes were not due and not paid by him till after the solicitor's bankruptcy. There the notes, being payable to the solicitor's order at the client's bankers, were treated as a loan by the parties; at the date of the bankruptcy the lender of the notes had become liable to pay, at all events, the contents of them to holders chosen at the solicitor's pleasure, they being made payable to the order of the solicitor, and nothing could prevent this liability from ending in a debt from the solicitor to the client, but the solicitor himself repaying the money advanced upon them. The client could not, by any act of his own, prevent his money coming into the hands of the solicitor, or of the payee chosen by him, to a fixed amount, and at specified times. This case, therefore, comes clearly within the restriction imposed by the case of *Rose* v. *Hart,* on the doctrine laid down in *Olive* v. *Smith.* And the same observation applies to *Ex parte Wagstaffe,* (13 Vesey, 65,) where the credit in question arose from an acceptance of the bankrupt, payable after the bankruptcy, but certainly payable then.

The case of *French* v. *Fenn,* (1 Cook, Bankrupt Law, 536,) is also distinguishable from the one at bar; although it must be allowed to have gone further than any decision which preceded it, excepting *Ex parte Deeze.* But it does not appear that the debt against which the price of the pearls when sold was allowed to be set off, was in any part contracted before the agreement respecting the pearls; and Lord *Mansfield* expressly says, that *Fenn* "had trusted *Cox* (the bankrupt) with other goods, which, in all probability, he could not have done but for the pearls being left in his (*Fenn's*) hands." This would make the case nearly the same with *De Mainbray* v. *Metcalf,* (2 Vern. 698,) where Lord *Cowper* relies namely upon the debt set off being, in fact, an advance made on the pawn. Lord *Mansfield,* in *French* v. *Fenn,* seems also to rely much on the circumstance peculiar to that case, of the other two partners in the adventure (*Cox* and *Holford*) having agreed to allow *Fenn* interest on the money which he had advanced to pay for the pearls in the first instance; and one thing is quite clear, *viz.* that by the nature of the transaction the rights of each partner, until sale, being to an undivided third, and *Fenn* having the deposit for sale, neither of the others could have obtained his share—nay, both the others joining could not have obtained their share, nor gotten the whole pearls out of the pawnee's hands—until the sale, which must at once render the credit to the pawnee certain. If it be said that *Cox* might have assigned his right to his share of the eventual price *minus* his proportion of the purchase-money, (in the same way that *Palmer* and Co. might have assigned their right to the contingent surplus,) then it must be also observed, that this consideration takes the case out of the rule laid down in *Rose* v. *Hart,* and could not stand with the decision in *Rose* v. *Hart.* It ought to be observed further, that *Ex parte Deeze* was relied upon simply by Mr. Justice *Buller,* in deciding *French* v. *Fenn;* both Lord *Mansfield* and Mr. Justice *Buller* seem to have been very much influenced by what they term considerations of general justice.

Upon the whole, then, we are of opinion that the judgment in this case must be reversed, and that the verdict taken by consent, subject to the opinion of the Court, should stand, and the *postea* be delivered to the plaintiffs. The interest, too, must be calculated subsequent to the time up to which the verdict for interest was taken, and this must be added to the verdict.

BHAEE-CHUND *and* KOOSAL-CHUND, Heirs to the Estate of ROOP-CHUND KEEM-CHUND, deceased - - - *Appellants,*

v.

PURTAB-CHUND MANIK-CHUND - - *Respondent.**

On Appeal from the Court of Sudder Dewanny Adawlut of Bombay.

Bombay Civil Court (Surat) Regulation (I of 1800), S. 13—Period of limitation prescribed under—Suit filed after expiry of—Sufficient cause—Continued residence of defendant beyond jurisdiction, if—Defendant's offer to pay specific sum by way of compromise, if an admission under the section.

A residence at *Poonah* beyond the limits of the jurisdiction of the Company's Courts is not such a " good and sufficient cause " for not commencing a suit for a period exceeding twelve years, as will entitle a plaintiff to recover under the *Bombay* Regulation I, A.D. 1800, sect. 13; and an offer of a specific sum by the defendant by way of compromise to a suit instituted after a lapse of twenty-seven years from the cause of action, is not such an admission of the truth of the plaintiff's matter of demand, as to take the case out of the prohibitory words of that clause.

7 DECEMBER 1836.

THIS was an appeal from a decree of the Sudder Adawlut in a suit in which *Purtab-chund Manik-chund,* the present respondent, was the original plaintiff, and *Roop-chund Keem-chund,* the father of the appellants, was defendant.

On the 23rd *November* 1819, the respondent filed his plaint in a pauper suit in the Zillah Court of *Surat* against *Roop-chund Keem-chund,* since deceased, for recovery of rupees 3,477. 1. 50., the amount of a promissory note given in *Sumvit* year 1849 (A. D. 1792-3) by *Roop-chund* to one *Kurum-chund,* payable on demand, and for an equal sum for interest on the note. The sum for which this note was given appeared to have been the balance of accounts subsisting between *Roop-chund* and *Kurum-chund,* and his partner *Pana-chund,* the respondent's uncles. At the date of the note, *Roop-chund*, the maker of it, was resident at *Poonah*, in the Peishwa's dominions, where he had been an inhabitant for upwards of thirty-five years, and remained until within a short period before the institution of the suit. *Kurum-chund* and his partner *Pana-chund*, and also the respondent, were inhabitants of *Surat*. The circumstance of *Roop-chund* having been resident out of the jurisdiction of the East India Company's Courts, was alleged as the cause of the delay in filing the plaint. *Kurum-chund*, the payee named in the note, died at *Poonah* in the year A. D. 1792-3. His widow (*Mussumat Larkee*) succeeded to his estate, including his interest in the note in question, which formed part of the assets of the partnership subsisting between *Kurum-chund* and *Pana-chund*. In the *Sumvit* year 1851, (A. D. 1794-5,) *Pana-chund*, the surviving partner, died, leaving his nephew, the respondent, his heir and representative, who thus claimed to be entitled to his deceased uncle's share and interest in the note, and in the other partnership assets. In the *Sumvit* year 1852 (A. D. 1795-6) a settlement of accounts took place between the respondent and *Mussumat Larkee*; and, according to the arrangement then concluded, the respondent claimed to be entitled to the whole of the partnership effects, including *Roop-chund's* note; and *Mussumat Larkee* executed in favour of the respondent a general release of all claims and demands, whether on account of the partnership or otherwise. Upon this title, or the release the respondent claimed the sole property in the note; and upon *Roop-chund's* coming to *Surat* in the *Sumvit* year 1874 (A. D. 1817-18) he demanded payment of the amount with interest. Payment having been refused, the respondent brought his action upon the note in the Zillah Court of *Surat*,

---

* Present : Lord Brougham, Mr. Baron Parke, Mr. Justice Vaughan, the Chief Judge of the Court of Bankruptcy, Sir Hyde East, and Sir Alexander Johnston.

1836.

BHAEE-CHUND and KOOSAL-CHUND *v.* PURTAB-CHUND MANIK-CHUND.

where he was admitted to sue as a pauper without payment of the usual commission fee. He appeared also to have conducted his case in person without the assistance of a vakeel.

Roop-chund, the defendant, by his answer to the plaint, alleged that the respondent's claim was without foundation, and that he, the defendant, had never had any dealing whatever with him. The defendant admitted that he had been an inhabitant of *Poonah* for thirty-five years, and insisted that if the respondent had any complaint to make against him, he might have laid his complaint before the Peishwa, and not in the *Surat* Adawlut.

The plaintiff (respondent) by his reply to the defendant's answer, in corroboration of the justice of his claim, referred, among other things, to accounts (of the date 1849 *Sumvit*) bearing the signature of the defendant, and showing that there was due from him, as the balance of accounts, the sum for which the promissory note in question was given.

Roop-chund, by his rejoinder, asserted that he never owed any thing either to *Kurum-chand* or to *Pana-chund,* the respondent's uncle, or to the respondent himself, and he insisted on the lapse of time in bar to the action.

The plaintiff (respondent) produced in evidence the defendant's note of hand, which was in the following form :—

"Dated Monday, the 1st *Magh-vud, Sumvit* 1849. I, *Roop-chund Keem-chund,* write to *Kurum-chund Pana-chund,* to the effect that I owe you the sum of rupees 3,477. 1. 50. of the *Haly* currency, to be repaid by me personally on demand, whether in my own or foreign country. Each of the rupees due by me is eleven *masha* in weight, and free from adulteration.

Interest thereon to be paid at the rate of 1 per cent. per month, amounting monthly to rupees 34. 3. 9.

"I must abide by this writing, as I respect my father's words.

"Securities for this debt are *Dadajun Dutroo* and *Junkusul Soorjee* (names of Jain deities).

(Signed) "ROOP-CHUND KEEM-CHUND,
the above writing is true."

Attested by ten witnesses.

He also produced two accounts with the defendant's signature, acknowledging the sum for which the note was given to be due from him on the balance of account up to the 1st *Magh-vud,* (the 10th month,) 1849 *Sumvit,* and the following acquittance and general release, executed by *Mussumat Larkee* and attested by seven witnesses.

"Dated Sunday, the 1st *Bysak-sood, Sumvit* 1852. I, *Baee Larkee,* widow of *Kurum-chund Pana-chund,* write to *Purtab-chund Manik-chund,* to this effect : that I have fully received the amount of expenses to be made on the funeral ceremony of *Kurum-chund,* performed at the end of the year, and for other charitable purposes, as bequeathed by *Pana-chund Lukhmee-chund.* I have, of my free will and accord, received this amount from you, *Purtab-chund,* and have voluntarily passed this release. I have now no claims whatever against you ; nor have I any other demand against you on account of partnership concerns, or any other trade. I have up to this day cleared up all claims. Whoever, therefore, deviates from this will renounce his religion.

"This writing is executed of my free will and accord.

"× Mark of BAEE LARKEE, widow, &c."

Witness, &c.

The plaintiff, (respondent,) who, from the subsequent

1836,

BHAEE-CHUND and KOOSAL-CHUND *v.* PURTAB-CHUND MANIK-CHUND.

testimony taken in the Sudder Adawlut at *Bombay,* appeared to have been a weak and ignorant person, and who conducted his own case, at first proposed to call two persons whom he summoned as witnesses to prove the defendant's signature to the accounts ; but he afterwards presented a petition to the Zillah Court, stating that it would be difficult to prove his claim by the evidence of the witnesses who had been summoned, as the dealing took place in *Poonah,* and he requested that the case might be referred to the arbitration of a *punchayet.**

The Zillah Court considered this petition to amount to a confession on the part of the plaintiff (respondent) that he was incapable of proving his case ; and the defendant having protested against all kind of arbitration, the acting Judge, on the 24th *March* 1821, gave judgment of nonsuit against the respondent, and directed the costs of suit to be recovered from any property of his that might thereafter be forthcoming.

Against this decree of the Zillah Court the present respondent appealed to the Sudder Adawlut at *Bombay,* and by his petition set forth the causes of his not having summoned the requisite witnesses ; and he alleged that the defendant, in the presence of many witnesses, had offered to pay down 3,000 rupees if the respondent would withdraw the suit. In his reply to the defendant's answer, who did not deny that he had made this offer, the now respondent (then the appellant) further stated, that subsequent to his appealing to the Sudder Adawlut, *the defendant had declared his*

---

* An assembly of five or more persons, (being always an uneven number,) convened under the authority of a public officer of Government, for the purpose of investigating a dispute referred to them. They are a Court of arbitration, but have no power to enforce their award.

willingness to pay 800 *or* 900 *rupees, if the respondent would give him a release for the remainder.*

On the hearing of the appeal from the judgment of nonsuit, the Sudder Adawlut expressed its opinion, that under the peculiar circumstances of the case, and as no judgment had been given on the merits, the best course to be pursued was to pass an interlocutory decree, reversing the decision of the acting Judge of the Zillah Court, and to refer the suit back to be tried *de novo*; informing the Judge, that the interests of persons, of the description of the present respondent, should not suffer for want of legal advice, as it would have been advisable to nominate a vakeel to assist him : and, accordingly, an interlocutory decree or reversal was, on the 10th *October* 1821, passed by the Sudder Adawlut.

In pursuance of this decree the proceedings in the Zillah Court were commenced *de novo*; but *Roop-chund,* the original defendant, having died, they were prosecuted against the present appellants, who were admitted to defend the suit as his heirs.

After the usual pleadings, two witnesses were examined ; one of whom (namely, *Mohun-chund Wel-chund,* who was resident at *Poonah,* and was examined under a commission) deposed that he had signed his name as a witness to the note in question at the desire of *Roop-chund* and *Kurum-chund.* The other witness was *Mussumat Larkee,* who was examined with a view to establish the present respondent's title to the note, founded on the partnership between her late husband, *Kurum-chund,* and the respondent's uncle, *Pana-chund*; the heirship of the respondent to *Pana-chund*; the execution by herself (*Larkee*) of the release, previously adduced in evidence by the respondent, and the making over of the promissory note to the respondent by vir-

1836.

BHAEE-CHUND and KOOSAL-CHUND v. PURTAB-CHUND MANIK-CHUND.

tue of the release, and as part of the partnership assets: to which parts the interrogatories prepared for the examination of this witness were acordingly directed. *Mussumat Larkee,* however, on her examination upon these interrogatories, deposed that she signed, or more properly placed her mark to the deed of release, without its ever having been read over to her, and denied that it had any reference to the partnership between her late husband and *Pana-chund,* (but that it was for money due to her husband alone,) or that thereby or otherwise, the respondent had acquired any title to the note; and she alleged that the respondent had lived in her house, and transacted her business, by which means he got possession of the books, &c. of the witness, and stole them, and, among others, the note in question.

Upon the evidence of this witness, (*Mussumat Larkee,*) the Zillah Court having refused to take the evidence of the living witnesses to the release, although pressed by the present respondent to do so, proceeded, on the 14th *February* 1823, to give judgment on the case; and the sitting Judge having stated his opinion, that the evidence of the woman (*Larkee*) was fatal to the present respondent's claim, and that he had not shown in proof why the statute of limitations of twelve years* should not bear upon his case, pronounced a

---

* "A.D. 1800, Regulation I, sect. 13. The Judge is prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period, for the matter in dispute, to a Court of competent jurisdiction, to try the demand,

1836.

BHAEE-CHUND and KOOSAL-CHUND v. PURTAB-CHUND MANIK CHUND.

decree against the present respondent, and directed that he should pay one half of the defendant's costs.

After these proceedings in the Zillah Court had terminated, the consideration of the case was, on the 2nd *June* 1823, resumed by the Sudder Adawlut; when the sitting Judge was of opinion that the evidence of the living witnesses to the release ought to be taken, and that witnesses ought also to be examined with respect to the alleged offers of *Roop-chund,* for an adjustment of the matter in dispute after the institution of the suit.

In pursuance of this opinion, several witnesses were examined upon both points before the Sudder Adawlut, among whom were *Koosal-chund Pana-chund,* (a gold and silver seller, residing at *Surat,*) and *Wugtchund Jye-chund* (a cloth seller, who was also an inhabitant of *Surat*). By their testimony the following facts were established : That *Mussumat Larkee's* release related to the partnership trade which her husband, in his lifetime, had carried on with the respondent's uncle, *Pana-chund* ; that *Larkee* was heiress to *Kurum-chund,* and the respondent heir to *Pana-chund* ; and that, after the execution of the release, the respondent paid the debts owing by the concern, and received the monies due to it ; that in the *Sumvit* year 1875 (A.D. 1818-19) *Roop-chund,* the late defendant, just before the institution of the suit, had sent for *Koosal-chund,* the nephew of the respondent, and told him that the respondent was going to file a suit against him (*Roop-chund*) on a bond and an account of old standing, and desired *Koosal-chund* to

---

and assign satisfactory reason to the Court why he did not proceed in the suit ; or that, either from minority or other good and sufficient

1836

BHAEE-CHUND and KOOSAL-CHUND *v.* PURTAB-CHUND MANIK-CHUND.

get his uncle (the respondent) to settle the dispute at home, and offered to pay down 2,000 rupees, and expressed his willingness to increase that offer by one or two hundred rupees.

Upon this additional testimony the second Judge of the Sudder Adawlut recorded his view of the case, which was as follows: "The Zillah Judge threw out the claim on the bare testimony of *Larkee-baee,* who denied the full extent of the *farrigh kutti,** that it embraced partnership concerns, although the document itself shows that it does, and is attested by respectable witnesses. As the deed must speak for itself, there cannot be a doubt of the general release having succeeded a general settlement of all matters between the parties; and in contradiction to the respondent's assertion regarding the manner in which appellant became possessed of (defendant's) bond, (or note of hand,) there is as little doubt that the bond fell to the appellant at the settlement. To go on *Larkee-baee's* testimony, which is so palpably wrong, would only be to mislead: it is therefore rejected *in toto.*

"The bond having been proved by the evidence taken at *Poonah,* nothing could prevent a decision favourable to the appellant at once, but that the claim is beyond the limitation of time. However, on an examination of this point also, the appellant's fortune befriends him; for the respondent lived at *Poonah* always, which prevented his being able to procure a settlement of the bond, although the appellant alleges that he did go once to *Poonah,* about ten years ago, on the business. The offer of adjustment proved to have taken place after the institution of the suit, and a very short time

---

* Deed of release and discharge.

1836.

BHAEE-CHUND and KOOSAL CHUND *v.* PURTAB-CHUND MANIK-CHUND.

after respondent's return to *Surat,* is sufficient for every purpose of admitting the justice of the claim. The sitting Judge acordingly conceives that the decision of the Zillah Judge should be reversed, and the amount of the bond, with interest and costs in both Courts, awarded to appellant. In consequence, the case is submitted for the consideration of a full Court.''

On the 26th *June* 1823, the appeal was brought on before a full Court, consisting of the chief and third Judges, when the proceedings held before the second Judge in the case when before him, sitting as a single Judge, were read; when the Court, after maturely considering the whole of the documents and proceedings, concurred generally in the view taken by the second Judge, and determined to reverse the decree passed by the Zillah Judge, and to award to the appellant (the present respondent) the original sum sued for by him in the lower Court, with the costs of suit in both Courts. A decree to that effect was accordingly made by the Sudder Adawlut.

Against this decree the present appellants appealed to His Majesty in Council; and submitted that the same ought to be reversed, for the following among other reasons:—

I. Because the respondent not only failed to establish a good title to the note in question, and to claim payment of its contents, but, on the contrary, his right to it was expressly denied by *Larkee,* the widow and heiress of *Kurum-chund,* to whom the note was given.

II. Because the appellant never was a fixed inhabitant of *Surat,* and therefore never, in fact, became subject to the jurisdiction of the Zillah Court there established.

1836.

BHAEE-CHUND and KOOSAL-CHUND *v.* PURTAB-CHUND MANIK-CHUND.

III. Because the plaintiff's right to sue for the money secured by that note was barred by the regulations of the *Bombay* government.

IV. Because sufficient evidence had not been given of the appellant's acknowledgment of the debt at *Surat*; and the case was, therefore, not taken out of the provisions of the Statute of Limitations.

The respondent, on the other hand, submitted that the appeal ought to be dismissed, and the decree of the Sudder Adawlut of Bombay affirmed, for the following among other reasons :—

I. Because the making of the promissory note in question by *Roop-chund,* and its connexion with accounts subsisting between *Roop-chund,* and *Kurum-chund,* and *Pana-chund,* were fully established by the evidence ; and the title of the present respondent produced, and the right of the present respondent to prosecute the suit, on which some doubt had been cast, was also clearly proved.

II. Because it appeared by the evidence taken before the Sudder Adawlut, that *Roop-chund* had, just before the institution of the suit, acknowledged the truth and justice of the respondent's demand ; independently of which, the continued residence of *Roop-chund* at *Poonah,* out of the jurisdiction of the East India Company's Courts, until within a short period prior to the filing of the plaint, was a good and sufficient cause (within the meaning of the exception in that behalf contained in the regulation for the limitation suits) for not proceeding to recover the amount of the note within twelve years after its date.

Mr. *Miller,* K. C., and Mr. *Wigram,* K. C., for the appellants, Insisted, on the reasons stated;—that the appellant was never subject to the jurisdiction of the Zillah Court, and that the plaintiff (respondent) had no power to sue him in that Court, referring to Regulation I, A.D. 1800, sec. 7; and they contended, that even if the plaintiff ever had such right, it was long since barred by the regulation for the limitation of suits;—that the offer of compromise did not amount to an acknowledgment of the debt, but was in fact only evidence of the appellant's desire to purchase peace on any terms, rather than be involved in an expensive and tedious litigation.

Mr. Serjeant *Spankie*, and Mr. *E. J. Lloyd*, for the respondent,

Relied on the reasons appended to the respondent's case, and contended that the period limited by the regulations for the institution of a suit ran only from the time that the appellant became amenable to the jurisdiction of the Company's Court at *Surat*, and not, as asserted on the other side, from the commencement of the debt. They insisted also that the offer of compromise was an acknowledgment on the part of *Roopchund* of the justice of the demand, and brought the case within the exception provided by Regulation I, A.D. 1800, sec. 13, and cited *Williams* v. *Jones*. (13 East, R. 439.)

The CHIEF JUDGE of the COURT OF BANKRUPTCY (The Right Honourable T. Erskine): 8 Feb. 1837.

This was an appeal from a decree of the Sudder Dewanny Adawlut at *Bombay*, which formed the last of a series of proceedings in the Court of that province,

1836.
BHAEECHUND and KOOSALCHUND v. PURTABCHUND MANIKCHUND.

upon the question now pending for the final decision of His Majesty in Council.

The first of these proceedings was a complaint filed in the Zillah Court at *Surat,* in the year 1819, against *Roop-chund,* since deceased, by the present respondent, *Purtab-chund,* suing in *forma pauperis,* in which he claimed, as heir of his late uncle, *Pana-chund,* the sum of sicca rupees 3,477, and an equal amount of interest upon a note of hand alleged to have been given by *Roopchund* in the year 1792 to *Kurum-chund,* the partner of the respondent's uncle, *Pana-chund,* to secure the amount of the balance then due from *Roopchund* to the partnership, after several intermediate proceedings in the Zillah Court and in the Sudder Adawlut, which it is not necessary to particularize; during which the defendant, *Roop-chund,* died, and the present appellants intervened, and were admitted to defend the suit.

The cause came on before the Zillah Court for final hearing on the 14th *February* 1823.

The defence set up during these proceedings by *Roop-chund,* and afterwards by his heirs, was,—

First, That *Roop-chund* never owed any thing to *Pana-chund* or *Kurum-chund.*

Secondly, That the note produced had been fraudulently abstracted from the widow of *Kurum-chund* by the plaintiff, who had no legal interest therein or right to sue thereon.

Thirdly, That the supposed cause of action had arisen more than twelve years before the commencement of the suit, and was, therefore, barred by the regulations of the Company.

In reply to the first defence, the plaintiff relied upon the production of the books of account and the note.

In reply to the second defence, it was stated, that after the death of *Kurum-chund* and the respondent's uncle, *Pana-chund,* he, the plaintiff, came to a settlement of the partnership accounts with the widow of *Kurum-chund,* who, having received from him her dues, gave him a deed of release, whereupon he took possession of the *dufters* and the note as having the exclusive right to them.

In reply to the third defence, he relied upon the fact that the note was executed at *Poonah,* where *Roop-chund* resided, and that he had never been at *Surat* since, until just before the commencement of the suit; and further, that *Roop-chund,* on his arrival from *Poonah* in 1819, had admitted the justice of his claim, and had offered to pay a sum of money by way of compromise.

The widow of *Kurum-chund* was examined upon interrogatories exhibited by the direction of the Court, and stated in substance, that the note had no reference to any partnership concern between *Kurum-chund* and the plaintiff's uncle, *Pana-chund,* but was given for money due to her husband alone, and that the release was executed by her without reading it, and was intended to relate only to charities and other like expenses. That at the time she executed it she did not give the note to the plaintiff, but that he stole it, together with her books and papers.

The Zillah Court, upon consideration of the whole case, was of opinion, that the evidence of *Kurum-chund's* widow was fatal to the plaintiff's claim, and also that the plaintiff had not shown any proof why the Statute of Limitations of twelve years should not bear upon his case, and therefore passed judgment

1836.

BHAEECHUND and KOOSALCHUND *v.* PURTABCHUND MANIKCHUND.

against the plaintiff, and decreed that one half of the defendant's costs should be recovered from the defendant, and the remainder from any property that might be found to belong to the plaintiff, and the fees of the plaintiff's vakeel should also be recovered from any property found to belong to the plaintiff.

The cause was then carried back by appeal to the Sudder Adawlut, before which fresh evidence was taken relative to the several questions raised before the Zillah Court; and on the 3rd *June* 1823, the second Judge, before whom the cause was heard, recorded his view of the case, declaring his opinion, for the reasons therein stated, that the decision of the Zillah Judge should be reversed, and the amount of the note, with interest and costs in both Courts, should be awarded to the plaintiff below; and these appellants having referred the case for the consideration of the full court, afterwards, on the 26th of the same month, the rest of the Court, after considering the documents and proceedings, concurred generally in the view taken by the second Judge, and determined to reverse the decree passed by the Zillah Court at *Surat*, and decreed that the sum of sicca rupees 6,954. 3 anas be paid to the appellants by the heirs of *Roop-chund*, with full costs in both Courts.

Against this decree the present appeal has been lodged, and the case was argued before this Board on the 7th *December* last, when the counsel for the appellants insisted,—

First, That the respondent had made out no right of action against *Roop-chund* or his heirs.

Secondly, That as the supposed cause of action had arisen beyond the jurisdiction of the Court at *Surat*, and as the defendant, *Roop-chund*, was not resi-

1836.

BHAEE-CHUND and KOOSAL-CHUND *v.* RURTAB-CHUND MANIK-CHUND.

dent within it as a fixed inhabitant, but had only come to *Surat* for a temporary purpose, the Zillah Court had no jurisdiction on the case.

And, Thirdly, That the plaintiff's right of action, if it ever existed, had been barred by the lapse of time.

Their Lordships intimated their opinion, in the course of the argument, that the plaintiff's title to sue, unless he had been barred by the lapse of time, was sufficiently established by the evidence; and that as the heirs of *Roop-chund* had intervened in the suit, and there was no evidence that they were not resident at *Surat,* where *Roop-chund* had formerly lived, no objection could be raised by them to the jurisdiction, especially as no such point was made by them in either of the Courts below, where the fact could have been easily ascertained. It is therefore unnecessary to say any thing now upon those points; and the less so because their Lordships are of opinion, that upon the third objection the decree of the Sudder Adawlut must be reversed, and the plaintiff's suit dismissed.

That objection was founded upon the 1st Regulation of the Governor of *Bombay,* confirmed in Council in *August* 1800, for the institution of a Court of Justice at *Surat.*

By the 13th sec. of that Regulation, the Judge of that Court is prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant's case show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period for the matter in dispute to a Court of competent jurisdiction, to try the demand, and assign satisfactory reason to the Court why he did not proceed in the suit; or that either from minority, or some other good and sufficient cause, he had been precluded from obtaining redress. In this case the cause of action was twenty-seven years before any suit was commenced. Unless, therefore, the respondent can bring himself within one of the exceptions to this prohibition, the dismissal of the complaint by the Zillah Court of *Surat* must be held to have been right, and the decree of the Sudder Adawlut erroneous.

The respondent contended, and the Sudder Adawlut decided, that the case was brought within two of the exceptions:

First, That the defendant had admitted the truth of the demand.

And, Secondly, That the plaintiff was prevented by the defendant's continued residence at *Poonah*, where the note was given, from procuring a settlement of the bond; and that he had thereby shown, that, by a good and sufficient cause, he had been precluded from obtaining redress.

The evidence upon which the supposed admission by *Roop-chund* of the truth of the plaintiff's demand rests, is to be found in the depositions of *Koosal-chund Pana-chund*, and of *Wugt-chund Jye-chund*, taken before the Sudder Adawlut.

But when this evidence is examined, it will be found to amount to no more than an offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand, further than what may be inferred from the offer of any compromise,—an inference which is never per-

1836.

BHAEE-
CHUND
and
KOOSAL-
CHUND
v.
PURTAB-
CHUND
MANIK-
CHUND.

mitted, and which, in this case, would be most unfair, when the action was commenced while the defendant was absent, for a temporary purpose, from his usual place of business, to which he was anxious to return.

Their Lordships, therefore, are of opinion, that the facts stated by those witnesses ought not to be taken as proof of any admission by the defendant of the matter of the plaintiff's demand, so as to take the case out of the prohibitory clause of the 13th article of the Regulation.

The only other ground upon which the plaintiff seeks to be exempted from the effect of the prohibition, is the continued residence of the defendant at *Poonah*. But no evidence is to be found in any of the proceedings to show that the plaintiff might not, by adopting proper steps, have obtained redress in the Mahratta Courts at *Poonah*.

It was stated, indeed, in the course of the argument, that it was useless for a poor man to commence proceedings against a wealthy opponent in the Peishwa's Court; but their Lordships cannot, in the absence of all proof, judicially assume this as a fact. It was also urged, that the decision of the Judges of the Sudder Adawlut, who must be presumed to know how justice was administered in the native Courts, might be taken as evidence; that the plaintiff could not have procured redress there if he had attempted it. But the second Judge, who alone gives any reasons for the decree, does not assign this as the reason why the plaintiff was prevented obtaining an earlier settlement of the bond at *Poonah*; and we have upon this fact the opinion of the Zillah Judge the other way.

Their Lordships, therefore, are of opinion, that they ought not to adopt these vague surmises as a substi-

1836.

BHAEE-CHUND and KOOSAL-CHUND *v.* PURTAB-CHUND MANIK-CHUND.

tute for the clear and positive proof required by the Regulation in question.

If their Lordships had found that, by a train of decisions in the Court abroad, the residence of the defendant beyond the limits of the jurisdiction of the Company's Court had been considered a good and sufficient excuse for the complainant's delay beyond the twelve years, they would have considered themselves bound by a practice upon which the plaintiff might fairly be presumed to have relied; and the case has been allowed to stand over for the purpose of enabling the counsel of the respondent to produce any such decisions : but none can be found. In the absence, therefore, of authority, their Lordships can find no principle on which they can determine that the residence of *Roop-chund* at *Poonah* afforded such an obstacle to the plaintiff's obtaining earlier redress as to exempt him from the effect of the prohibition under discussion.

The learned counsel for the respondent relied very much upon a decision, in this country, in the case of *Williams* v. *Jones*. (13 East, R. 439.)

But the point argued and decided in that case was essentially different from the case now under discussion.

In that case the plaintiff's claim was clearly brought within the express exception of the statute; but it was contended that his right of action was gone, because, by the adoption of the Statute of Limitations in India, where the contract was made, his remedy had been barred there by the lapse of time : and the decision of the Court proceeded upon the ground, that as before the Statute of Limitations the plaintiff's right of action in this country had no limit, and as the circumstances of the case exempted it from the operation

1836.

BHAEE-CHUND and KOOSAL-CHUND *v.* PURTAB-CHUND MANIK-CHUND.

of that statute, his remedy could only be barred by the extinguishment of his right; and as the adoption of the Statute of Limitations in India could only bar his remedy there, but did not extinguish his debt, his remedy in this country remained unimpaired. But in this case the only question is, whether the plaintiff's proof brings him within the exceptions.

Their Lordships are of opinion that it does not : he has neither proved an admission of the truth of his demand, nor that, by a good and sufficient cause, he has been precluded from obtaining redress within the time limited by the Regulations; and therefore their Lordships will recommend His Majesty to allow this appeal, to reverse the decree of the Sudder Adawlut, and to affirm the sentence of the Zillah Court.

CASES IN THE PRIVY COUNCIL

ON APPEALS FROM THE EAST INDIES.

THE MAYOR OF THE CITY OF LYONS, in the Kingdom of *France*, acting for and in the name of the Community of the City of *Lyons*, and CHRISTOPHE MARTIN, MARIE DESGRANGES MARTIN (Widow of LOUIS MARTIN, deceased), PIERRE BALLOFFETT and CLAUDINE his wife, and FRANCOIS MARTIN - - - - - } *Appellants,*

v.

The Honourable the EAST INDIA COMPANY and HIS MAJESTY'S ATTORNEY-GENERAL - - - - - } *Respondents.**

On Appeal from the Supreme Court of Bengal.

Right of Aliens to hold Lands in Calcutta—Statute of Mortmain not applicable to India—Charitable bequest.

The introduction of the English law into a conquered or ceded country, does not draw with it that branch which relates to aliens, if the acts of the Power introducing it show that it was introduced, not in all its branches, but only *sub modo*, and with the exception of this portion. The English law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into the *East Indies*, so as to create a forfeiture of lands held in *Calcutta* or the *Mofussil* by an alien, and devised by a will executed according to the Statute of Frauds, for charitable purposes.

Semble.—The Statute of Mortmain does not extend to the British territories in the *East Indies*.

A testator devised considerable property, both real and personal, for charitable purposes, amongst which he directed certain sums to be set apart

THIS was an appeal from a decree of the Supreme Court of Judicature at *Fort William*, in *Bengal*, of the 23rd *February* 1832, made in four causes which had been consolidated, touching the construction of the will of the late *Claude Martin*, and the bequests thereof. 2,3, & 12 Dec. 1836.

Major-General *Claude Martin* was a native of

---

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy.

Privy Councillors,—*Assessors*, the Right Hon. Sir Hyde East, and the Right Hon. Sir Alexander Johnston.

1836.

MAYOR OF LYONS
v.
EAST INDIA COMPANY.

France, having been born at *Lyons.* In 1763 he entered the service of the East India Company as a cadet, and after passing through the various intermediate grades of profession, he attained, in 1793, the rank of a major-general. He never, however, received full pay for any higher rank than that of captain, with which he entered in 1766 into the service of the *Nabob Vizier* of *Oude,* under the sanction of the British Government ; and he continued in that service, occasionally commanding the troops of the *Nabob Vizier,* residing at *Lucknow,* and receiving his half pay as a captain from the East India Company until his death on the 6th *September* 1801.

for the liberation of persons imprisoned for debt, and for the endowment and establishment of a College at *Lucknow,* in the dominions of the King of *Oude.* A suit having been instituted in the Supreme Court of *Calcutta,* to administer the will, the Court directed an inquiry whether the College could be established, and the bequest for the liberation of prisoners carried into effect, with reference to the testator's intention, and the sanction of the Government at *Lucknow.* On the subject of the bequest for the liberation of prisoners, the Master found in the negative, and reported that with respect to the establishment of the College, there was not sufficient evidence to enable him to state whether it could be established with reference to the testator's intention, and the sanction of the *Lucknow* Government; but as no further evidence was likely to be obtained, he appended the correspondence with the British Resident at *Lucknow,* by which it appeared that though the King of *Oude* did not object to the establishment of the College, he held out no expectation that he would afford it his countenance or support. The report having been confirmed, and a decree made thereon, the Supreme Court, on a re-hearing of the cause, directed an inquiry whether the Governor-General, in Council, had the means of giving effect to the bequest to the College at *Lucknow,* and whether he was willing to receive the funds bequeathed for that purpose : the Master found that the Governor-General was willing to receive the funds, but did not state whether he had the means of giving effect to the bequest; the Court, however, thereupon decreed the payment of the funds to the Governor-General, or such person as he should appoint. Upon appeal to the King in Council, held by the Judicial Committee, that though the reference to the Master on the re-hearing, after the confirmation of his previous report, was informal, and if objected to at the time would have been fatal, yet as no objection had been taken, and the Master had not satisfied the whole of the inquiry, by stating whether the Governor-General had the means of carrying the testator's intention into effect, that part of the decree affirming the Master's report, and directing the payment of the fund to the Governor-General, must be reversed, and the case sent back to ascertain that fact; their Lordships being of opinion that under the existing relations between the East India Company and the King of *Oude,* an arrangement may be made for the appointment of a trustee to carry the *Lucknow* bequest into effect, under the directions and subject to the jurisdiction of the Supreme Court.

1836.

MAYOR OF LYONS.
v.
EAST INDIA COMPANY.

On the 1st *January* 1801, General *Martin* signed and executed his will, bearing that date, in the presence of the British Resident at *Lucknow* and two other persons, who only attested its execution. At that time, and at the period also of his death, he was possessed of large landed estates in the provinces of the *Nabob Vizier,* where the Mahomedan Law is the law of the country ; in the territories of the East India Company, governed by the regulations of the Governor-General in Council ; in the city of *Calcutta,* under the jurisdiction of the Supreme Court in the town of *Chandernagore,* originally a French settlement, and wherein the French laws still prevail, although within the Presidency of *Fort William*; and in the Kingdom of *France*; he was also possessed of very considerable personal estate of every description, including large investments in the Government securities of the East India Company, and in the British funds.

The will was composed and written by the testator himself, as he therein declares, in the English language, of which he had a very imperfect knowledge. It was divided into thirty-four articles or clauses, and there was added to it a paper by the testator, as an abstract, containing a recapitulation or statement of the legacies, and the bequests, contained in the different clauses of the will, with the amount of each pecuniary bequest set forth in figures.

The abstract was thus entitled :—"No. 1, A. Abstract of the articles and pensions and sums to be paid as I gave and bequeathed by my will and testament, wrote by me on the 1st of *January* 1798, of which abstract I mentioned in folio 6, line 9, and folio 7, line 10, and also afterward. This is wrote by me. Witness my hand, *Cl. Martin.*"

Annexed to the will, and also referred to therein, were certain accounts during the years 1795, 1796, 1797, 1798, to the 1st *May* 1799, taken from the ledgers or account-books of the testator, showing the debts due by, and to him, with his own valuation of the various kinds of property he possessed, both real, and personal, balanced on the 30th *April*, in the first three years, and on the 1st *May* in the last year.

The abstract and these accounts were proved with the will.

By the first article of his will, the testator, after giving their freedom to all the women, males, and women-servants, eunuchs and others that belonged to him, and should be in his service at the time of his death, and commending them, especially his faithful girl *Boulone* or *Lise,* who had lived with him as his wife, to the especial care of the persons thereafter named as executors of his will, he expressed himself in these terms :*—"I desire that as soon as I am dead, that the sum of 4,00,000 sicca rupees (or four lacks of rupees) be put aside from the best part of my fortune, and be placed at interest in the most secure fund, as that said interest may serve to pay the donation and monthly pensions, as hereafter mentioned in their several articles ; as also as may be seen by the recapitulation or abstract list of the pensions and donations I have made, and sealed and signed by me, and marked No. 1, A. in which the total of yearly, and monthly pensions, I have made to every one mentioned in this will and testament are, as also for other sums to be paid for once are included, amounting to sicca rupees [*blank left in the original*] as that they may be a suf-

---

* The extracts from the will are literal, the language and orthography being preserved.

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

ficient sum for the answer of all these gift, pension, and others I have mentioned, to put aside, from the best of my fortune, the sum above said for six hundred thousand sicca rupees, for to be secured in the best and most secure fund, either in *India* or *Europe,* as to receive and raise the best and most secure interest for the enable to pay these pensions, gift, or others. At this moment as I see no better secured fund but the Honourable English East India Company promissory notes or bonds, bearing eight and twelve per cent. interest ; for these reasons I request that the above sum here mentioned be deposited in the Honourable Company's treasure, in the name of my estate, in their promissory notes or bonds, for to pay my executors, administrators, or assigns, or others, the dividend of the interest, for to enable them to the pension, donation, gift, or others, as hereafter mentioned. I also desire and command that all other sum or sums that are to be put at interest in secure funds, be deposited and placed in the Honourable East India Company's treasure, for the purpose that will be mentioned hereafter : and as I have made several others large gift for charitable purpose,* as will be seen by the several articles hereafter mentioned, which at this moment stand on the list or abstract No. 1, A. for building and other establishment, to the sum of sicca rupees seven hundred and seventy-four thousand, and for once 2,85,300† sicca rupees, and also for a sum to be paid annually,‡ the sum of sicca rupees for monthly pensions, annually thirty-five thousand seven hundred and sixty,§ for these above sums ;

* Augmented to 10,74,000 sicca rupees.—*Cl. Martin.*[1]

† 2,95,300.—*Cl. Martin.*[1]

‡ Also d.[1]

§ Augmented to 39,760 sicca rupees.—*Cl. Martin.*[1]

---

[1] These additional sums were expressed by interlineation in the original will.

the next best of my fortune is to be appropriated for these establishment and charities, and others building, as my tomb, seray women, houses, compounds, and others, as mentioned in the several articles as hereafter mentioned. These sums are also to be deposited in the Honourable Company's treasure while the Honourable Company exist, or, if ever abolished, to be deposited in the Town House Supreme Court or Government existing for the time, as that these sum or sums may be secured, and never to run the risk of being lost by private security of individual; it is my reason for having these sum or sums deposited in the existing Government treasure, with power to draw occasionally the sums required, for to go on with the buildings that are to be erected. The interest will serve to pay the annual pension, donation, or expenses for entertaining and keeping in good order the said building. Any sum remaining for the interest of the sum deposited in the Honourable Company, in theirs promissory notes or bonds, or others of more or less interest, and under others denomination than Company's paper, such as bond of Government, or others bearing interest, as I said any sum remaining from the interest, after having paid the several annually and monthly pension, this sum remaining is to serve for to purchase more stock in the said secure fund for the time being, as to be also placed as the other, for to be enabled to produce also an interest for the benefit of my estate. And when a sufficient sum or sum, equal to be enabled to increase the four establishments mentioned in articles one, two, three, and four or five, and in the succession of years, in case of good management, luck, and good fortune, no accident happening, that these sums deposited or others that may be deposited as I may hereafter mentioned; I also

1836.

MAYOR OF LYONS v. EAST INDIA COMPANY.

desire, request, or command my executor, administrators or their assigns, that they would devise with themselves, and with the best advice they could receive, that in case, as I say'd, by succession of time, that the sum that may be deposited exceed by great deal, the interest necessary to be paid for the monthly, or annual pension, donation, &c., yearly and monthly as mentioned, and that they are a sufficiency without interfering or touching any of the principal for the annual or monthly pension and disbursement above mentioned, then they may, after having well considered, make any new establishment for charitable purpose on the same plan, and with the same formality, to be observed in them as mentioned, to those I have herein recommended, that the donor may be known after his death, which ambitious purpose may induce other to make charitable establishment, may kind being more actuated by ambition and vanity in hope, I may be excused for such an idea, though I have endeavoured never to be laid or actuated in doing good act by the vanity of doing it; still, often I could not prevent my feeling to be sensible of the pleasure of what I did, and as I have often encouraged and humoured others in their vanities, provided the good act was done, I am in hope that I shall receive the same indulgence; having never had at heart to increase my worth or fortune, but for the ambition of doing good to others, I am in hope my wishes, and last will be executed and fully performed after my death, and to be understood also, that at the or after the death of those to whom I have given pension for during their lives, at their death, these are to be resumed, and to be brought to the stock of my estate, as to serve to increase the establishment, as hereafter will be mentioned, and to create or establish others, as I may devise during the course of my life, or if I have not done it myself, they are to be done as may be devised by my executors, administrators or assigns, or the trustee of my estate, after consulting able men on the subject of establishing useful, and charitable establishment for the public good, my executors, administrators, or trustees, I may and will, if time admit my choosing properly, name them at the end of this will and testament.''

In the following articles of his will, from two to seventeen, the testator proceeded to make various bequests of legacies and annuities to the females of his household, and to his servants : these legacies, as summed up in the abstract, amounted to 13,460 rupees.

By the 17th article the testator directed the payment, as soon as his death should happen, of the sum equivalent to the amount of the monthly and yearly pensions, amounting to 13,460 sicca rupees, and an investment to be made of the sum of 2,00,000 rupees in the East India Company's Treasure; and he also directed the payment of two months' wages over and above the wages he might owe to his servants at his death; and in the abstract there was a corresponding memorandum after the sum of 13,460 rupees.

By the 18th and 19th articles the testator gave legacies for the purpose of building a house for two of his women, *Boulone* or *Lise,* and *Sally*; and he also gave several legacies to his women and servants, the amount of which was again recapitulated in the abstract.

By the 20th article he gave various bequests to his relations in *France.*

In the 21st article the testator gave a life interest in some, and his absolute property in other parts of his landed estate at *Lucknow* to the women *Boulone* and *Sally*.

The 22nd article was principally a declaration of his religious sentiments.

The 23rd article was in these terms :—" I give and bequeath the sum of 1,50,000 rupees for to be placed out at interest in the most secure manner possible, in the East India Company or Government papers, bearing interest, to be employed for the poor. First having divided this interest in three portions or parts, one portion of that interest to serve for the relief of the poor of *Lucknow,* of any religion they may be, preferring the Christian and Hindoo. This to be managed or distributed by Christian padree, or priest, either Roman Catholic, Protestant, or Mussulman mollah ; that charity to be in kind, either grain, flour baked or unbaked ; and to be delivered to the poor at a fixed hour in the forenoon, and at the place near where my tomb or monument is erected ; and at that place they shall be an inscription on a stone marbles, or others mentions, the charity and my name, as that it may known the sum established for the charity and the donor, in this manner : '*The sum of* 1,50,000 *sicca rupees is the gift of Major-General Martin, born at Lyons, for the interest of it to be daily distributed to the poors of Lucknow, at perpetuity,*' requesting the magistrate, or prince, or nabob governing the country, to protect that charity, that it may not be abused and not be unpaid. Another portion of that interest to be made and employed for the poor of *Calcutta,* to be managed by the curate of the English church, and distributed by him, observing to have an inscription on a carved stone, to be fixed on the wall of the church, or any other public place where the charity is to be distributed, this inscription, and to be such ones as the *Lucknow* one. One's purpose of this inscription is, that it may never be forgot, and that if perchance the cash of the interest was not paid, that charitable man could, by seeing such an inscription, inquire and represent to the magistrate as to bring to account my administrators, trustees, or other managers, for having neglected the payment of such charity. The third portion of the interest is to serve for the relief of the poor of *Chandernagore,* and to be managed by the head of the French church, either curate, priest or other; also to be delivered to the poor, daily, at a fixed hour, at or near the gate of the church *Chandernagore.* At that place, also, to have such carved stone on the wall of the church, with the same inscription as at *Lucknow* in French language, at *Calcutta* in English, and at *Lucknow* in Persian and Hindoo. The inscription to be as said before, viz.: The sum of 1,50,000 sicca rupees is the gift of Major-General *Claude Martin,* born at *Lyons,* aged years, and died the month of , in the year , and is buried at . Pray for his soul! The interest of that sum is to be divided into three parts, distributed daily for the poors of *Calcutta, Chandernagore,* and *Lucknow,* in kind or cash, requesting my executors, administrators, or assigns, to put those charity on the protection of the Government, where they are to be made, and the Supreme Court to control it as to see it carried on properly: I also give and bequeath the sum of one rupee per day, or 365 rupees per annum, to each distributor of the charity for their trouble of receiving the money, buying grain, &c., and distributing the charities to the poor at the several places, as said before; the sum for the three places making 985: also give the sum of fifty

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

sicca rupees for buying papers or other to each manager of the charity, making in all this 1,135 ; adding 65 rupees more, to be divided between three place for a servant cleaning the place, making for all 1,200 sicca rupees."

By the 24th article the testator gave and bequeathed the sum of 2,00,000 sicca rupees to the town of *Calcutta,*—"for to be put at interest in Government paper, or the most secure mode possible ; and this principal and interest to be put under the protection of Government or the Supreme Court, that they may devise an institution the most necessary for the public good of the town of *Calcutta ;* or establishing a school for to educate a certain number of children of any sex, to a certain age, and to have them put prentice to some profession when at the conclusion of their school, and to have them married when at age ; and I also wish that every year premium of few rupees or other thing, and a medal, be given as to the most deserving or virtuous boy or girl, or both, to such that have come out of that school, or that are still in it, and this to be done on the same day in the month I died, that day those that are to married, are to be married, and to have a sermon preached at the school, to the boy and girl of the school, afterward a public dinner for the whole, and a toast to be drink'd in *memorandum* of the fondator. This institution is to bear the title of *La Martinere,* and to have an inscription either on stones or marble in large character, to be fixed on any part of the school, on it wrote, Instituted by Major-General *Martin,* borne the of *January* 1735, at *Lyons,* who died the day, month, and year, mentioning the day, month, and year, and buried at , mentioning the place ; and as I am little able to make any arrangement for such an institution, I am in hope Government or the Supreme Court will devise the best institution for the public good, and to have it as I said above mentioned, the name of the institutor ; after every article of my or this will and testament is or are fully settled, and every articles provided and paid for, the several pensions or other gift, donation, institution and other, any sum remaining may be made to serve : first, buy or built a house for the institution, as that it may be made permanent and perpetual, by securing the interest by Government papers, either in *India* or *Europe,* that the interest annually may support the institution : for this reasons I give and bequeath 1,50,000 sicca rupees more, according to the proportion that may remain after every articles of this testament is fulfilled, then this sum to be added for the permanency of that institution, making the sum of 3,50,000 sicca rupees."

In the 25th article the testator gave and bequeathed 2,00,000 sicca rupees to be deposited in the most secure interest fund in the town of *Lyons,* in *France,* and the magistrates of that town to have it managed under their protection and control, for the foundation of an institution to bear the name of *Martiniere ;* and in case the 2,00,000 sicca rupees were not sufficient for a proper interest to support the institution, and buying or building the house therein directed, he gave and bequeathed an additional sum of 50,000 sicca rupees, making 2,50,000 sicca rupees ; and he also gave and bequeathed the sum of 4,000 sicca rupees to be paid to the magistrates of the town of *Lyons,* to liberate from prison so many prisoners for small debts as it would extend to.

The 26th article contained a direction, that if the pensions to his legatees should not be regularly paid, the sums allowed for daily distribution in charity

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

should be stopped and applied for that purpose, and a request that the magistrate of *Calcutta* or other place, or the prince or governor would remove any of his executors or trustees that should misbehave themselves.

The 27th article was in these terms :—My house at *Calcutta,* formerly the *Bengal* Bank, the one at *Champaul Gaut,* the one formerly the Manege, the one at *Intally,* are not to be sold, but kept for the estate ; also my house at *Chandernagore* is not to be sold. My estate of *Nuzupheur* or *Martinghur* is to be kept : and I desire, and it is my wishes, if it is to be put under the management of Mr. *Joseph Quierose,* and also the farm I rent from *Almessally Kaun* in the *Corra* districts, with also the farm I rent from *Bisenout, Gattumpour, Magoor, Nagur, Panum,* &c. These farm are to be continued farming and indigo to be made on them, following the same mode and rule I have adopted, as to have the indigo made cheap and good, and by that mode very feinfetable. And as to facilitate Mr. *Joseph Quierose,* he is to have a third share of the benefit accruing from the neat produce from *Europe* to *Bengal,* from that indigo.'' It then proceeds to give more specific directions as to the carrying on the plantation of indigo ; and the testator then says,—'' My house at *Luckperra,* or *Constantia* House, is never to be sold, as it is to serve as a monument or tomb for to deposit my body in; and the house is to serve as a college, or for educating children and men for to learn them the English language and religion, those that should wishes to be made Christian. At, or by that house, the charity, as mentioning in the article 23rd, is to be made, and there to be distributed the grain, flour, or cash to the poors; and the inscription is to be fixed on the wall of the house, to some place where the poors are to assemble and receive the charity. The same sort of ceremony is to be made, and inscription wrote, in memory of the institutor, as said in the articles 23rd. A large sum or establishment will be made and wrote in this will and testament to keep the monument in good order, and a proper quantity of peoples of every denomination for educating children and learning English.''

The 28th article was in these terms :—"I give and bequeath the sum of 5,000 sicca rupees, to be paid annually to the magistrate or Supreme Court of *Calcutta,* or to Government. This sum is to serve to pay the debt of some poor honest debtor detained in jail for small sum, and to pay as many small debt, and liberate as many debtor, as the sum can extend. This liberation is to be made the day month I died, as a commeration of the donor; and as being a soldier, I would wish to prefer liberating any poor officers or other military men detain for small preferable to any other. And I also give and bequeath the sum of 1,000 sicca rupees, to be paid yearly, and to make a distribution of it to the poor prisoners remaining in jail, on the same day as the one mentioned above, both sums making 6,000 rupees every year.''

In the 29th article the testator gave several small bequests.

In the 30th article the testator directed that his body should be embalmed and deposited in a coffin of Sisso wood, in the cave of his house at *Constantia,* which is not to be sold, and it also contained very specific directions for the care of his house, for the pension of his servants who were to keep it, for the privileges of the two women, *Boulone* and *Sally,* if they should choose to live there, and a provision of 4,000 rupees for their tombs if they should choose to be buried there.

The 31st article contained directions for the building of *Constantia* House, if it should not be finished at his death.

The 32nd article commences—" For to keep *Lackparra* House, or *Constantia* House, as a College for instructing young men in the English language, and taking care of my tomb, which house was properly my reason for having built it, wanting at first, to make it for my tomb or monument, and a house for a school or college for learning young men the English language and Christian religion, if they find themselves inclined; but as now the house is of such an extensive plan, it may serve after my death to lodge for a certain number of day strangers, coming to *Lucknow*, but never to remain in it above two month, as to give room to other comer, and not to be the permanent residence of any one, only to be temporarily and for a few days ; on this I am in hope, if the gentleman does not mind the requisition of the *Derogah Matchow* or his substitute, that they will be made to quit the place by the superior power of the country, whom I request will take under its protection that establishment, and protect and support the *Derogah* in the management of it." It then proceeds to give specific directions as to the establishment to be kept up at *Constantia* House, the management of his farms by Mr. *Joseph Quierose*, or by an European superintendent if Mr. *Quierose* should refuse the trust, and the remittance of the produce to *Europe*.

In the 33rd article the testator proceeded thus :—"I nominate, by this my will and testament, Messrs.

Joseph Quierose; the house of Messrs. *Barber, Palmer*; Messrs. *Jacques, Maximin, Deverinne* and Sons; the house of Messrs. *Hamilton* and *Aberdeen*, and to communicate in *Europe* to my nephew or relation, for my executors, administrators, assigns, or trustees; and I request that they will be strict in having every articles of this will and testament to be strictly and regularly executed, and to have copy made for each executors, administrators, &c., and one to be deposited in the Supreme Court, to which I recommend my executors, administrators, assigns, or trustees, to put this said will and testament under theirs protection, or tender the protection of Government if necessary ; lodging or disposing all my ready cash and papers, money and other valuable property, in the Honourable Company's treasure, for better security, placing all the several sum mentioned in this said will at interest in the Honourable Company fund, or by buying the interest paper, as being the most secure funds; or if ever the Honourable Company do not receive any cash at interest, then to have it placed in the English fund, bearing interest; in short, to take all the best measure for securing the property of my estate, that the several pensions, gifts, establishment and other, may be regularly paid. My brother, *Louis Martin,* is to be joined as one of my executors, administrators, assigns, or trusty; and in his default to nominate my nephew, son of *Pierre Martin,* as any others in succession, as to have one of my relation joined in the execution of my will and testament; and I request Mr. *Joseph Quierose* to translate the said will, and send one to my relation in French, and one to Messrs. *Deverinne.* I have tied with a green ribbon an abstract of articles or list of the sums to be paid as pension monthly and annually, and the several sum for establishment and others. This list is already mentioned in this will at article 1st, and at article 17th. I have also tied to this will an abstract ledger for the year, by which it will appear that I am worth thirty-three hundred thousand six hundred and eighty thousand sicca rupees. All my account will be found in my offices, as per list, with Mr.——. The ledger will shew what due to me, and what owing, and all other property in *India* and in *Europe* ; and I request my same agent in *England* to be employed, Messrs. *William Thomas Raickes* and Co., and Messrs. *William Paxton* and Co. After all accounts being settled, and sum insured for the interest for the payment of the several monthly pension, and the several payment of gift and others, as also the several establishment, if a surplus above £100,000 sterling, or about ten lacks of sicca rupees, remain of my estate, that above surplus of ten lacks of sicca rupees is to be divided in such a manner as to increase the several establishment of *Calcutta,* at *Lyon,* and *Lucknow,* as that they may be permanent, and exist for ever. Besides the sum allowed for finishing all the building and other of *Constantia* House, which I suppose may amount to 2,00,000 sicca rupees, I also give and bequeath the sum of 1,00,000 sicca rupees for the support of the college and other school, to be regulated as the *Calcutta* Establishment, as per articles 24, as also as the establishment at *Lyon,* articles 25. The gift for the poor of *Lucknow,* to conducted as mentioned in articles 23. I also give and bequeath the sum of 4,000 rupees to be paid annually, for to liberate as many prisoner for debt at *Lucknow* as it may extend; and if none, then that sum is to remain to the estate. Any sum remaining is to be placed at interest for to accumulate and improve the several establishment and concern of indigo.''

The 34th article contained several specific bequests of jewellery, and mourning-rings, to his women and executors, and contained a provision for the payment to his executors, administrators, &c., of the usual commission, and as the Supreme Court should think necessary for their trouble.

This Will, together with the abstracts, was duly proved by *Gavin Hamilton, Alexander Aberdeen, John Caulfield, John Palmer,* and *Joseph Quierose,* in the Supreme Court at *Calcutta,* in the year 1800. It was also proved in the Prerogative Court of the Archbishop of *Canterbury,* by the same executors, with the exception of *Gavin Hamilton,* on the 18th of *July* 1803; by *Louis Martin,* the testator's half-brother, on the 5th of *April* 1802; and on his death letters of administration to the testator, with his Will annexed, were taken out by the Appellant, *Christophe Martin,* on the 13th *August* 1817.

For the purpose of having the several charities mentioned by the testator, established, and for carrying into execution the trusts of his Will, four suits were instituted in the Supreme Court of Judicature, at *Fort William in Bengal.*

The first was an information and bill, filed on the 20th *June* 1816, by *Edward Stredtell,* Esquire, the then Advocate-General for the East India Company, at the relation of *John Martin Wickins* against *Palmer* and *Deverinne,* two of the executors, for an account of the personal estate of the testator, and for the purpose of carrying into effect the direction contained in the 24th article of his Will, for the establishment of the charitable institution in the town of *Calcutta.* The defendants having filed their answers to this information, the cause came on to be heard on the 2nd *November* 1816, when the Supreme Court established the charitable bequest to the town of *Calcutta*, and directed the sum of two lacs of sicca rupees, confessed to be in the hands of *Palmer*, to be paid into Court, and applied in establishing that charity; and ordered the Master of the Supreme Court to approve of a proper scheme to effectuate such charitable purpose, and the Master was to take the usual accounts of the personal estate of the testator, and of his debts, legacies, and funeral expenses; and the Supreme Court directed a commission to issue to receive the claims of the legatees in *Great Britain, Ireland,* and *France*; and ordered the costs of the suit to be taxed, and paid out of the fund in the hands of the executor, *John Palmer*.

The second suit was instituted on the 26th *August* 1818, in the same Court, in the name of *Adam Petre Eustache Godinot,* Mayor of *Lyons,* acting in behalf for, and in the name of, the community of the city of *Lyons,* against *Palmer* and *Deverinne*, the executors of *Claude Martin,* praying that he might, on behalf of the city, be at liberty to receive the several legacies mentioned in the 25th article of the testator's Will, with interest; that a provision might be made to enable the community of the city, or its magistrates to receive 4,000 rupees *per annum,* to be applied as directed by the testator; that his landed property at *Calcutta* and *Chandernagore,* might be declared to be personal property; and that *Palmer* and *Deverinne* should give an account of his real and personal property ; and that the city of *Lyons* might be declared entitled to one-third of the clear residue of it.

On the 4th *August* 1819, the defendants put in their answer, in which the accounts of the estate were set out at great length.

The third suit was instituted on the 22nd *October* 1818, by the appellant, *Christophe Martin,* one of the legatees named in the Will of General *Martin,* and the son and executor *sous benefice d'inventaire* of *Louis Martin,* the testator's half-brother, and *Marie Desgranges Martin,* the widow, *Pierre Balloffett* and *Claudine* his wife, the daughter, and *Francois Martin,* the youngest son of *Louis Martin,* all of whom claimed beneficial interest under the Will, against *Robert Spankie,* Esq., the then Advocate-General, *Palmer* and *Deverinne.* In this suit the plaintiffs insisted that *Louis Martin* was entitled under the Mahomedan law, to all the testator's undisposed-of real and personal estate; that upon his death they succeeded to his right as his representatives and legatees; and they prayed for an account of the testator's real estate, that his real estate, wheresoever situate in *India,* might be sold; that *Palmer* and *Deverinne* might be charged with the loss arising from their negligence; and that the plaintiffs might be declared entitled to all sums invested for the payment of pensions and annuities, as the pensioners and annuitants might respectively die, and that the principal might be secured in the meantime: that *Palmer* and *Deverinne* should deposit all securities and title-deeds with the Accountant-General; and that the plaintiffs might be declared entitled to their legacies and all the undisposed residue of the testator's estate, and also to a legacy to his half-brother *Pierre Martin,* which had lapsed by the death of *Pierre Martin* in the lifetime of the testator.

The defendants, *Palmer* and *Deverinne,* on the 4th March 1819, put in their answer to this bill, in which they admitted their receipt of very large sums, in respect of the testator's personal estate, and of the rents and profits of his real estate in the provinces in *India*, subject to the East India Company in *Calcutta*, and in *Chandernagore*; but they stated that *Joseph Quierose* had taken possession of, and received the rents and profits of, the testator's real estate, in the province of the *Nabob Vizier*, and that *Louis Martin* had taken possession of the testator's personal estate, public funds, and stock of the East India Company, out of which he ought to have discharged the legacies to the testator's relations in *France*; and that *Palmer* had remitted to *England* two lac of rupees, amounting to £25,833. 6. 8. sterling to Messrs. *Paxton, Cockerell, Traill* and Co. of London, to pay the Mayor of *Lyons*, and that a suit had been instituted against Messrs. *Paxton, Cockerell, Traill* and Co., by the appellant, *Christophe Martin*, and the Mayor of *Lyons*, in the Court of Chancery in England for that sum.

The fourth suit was instituted on the 19th *February* 1819, by *Palmer* and *Deverinne*, the two defendants in the former suits, filing a cross bill against the appellants *Christophe Martin, Marie Desgranges Martin, Pierre Balloffett* and *Claudine* his wife, and *Francois Martin*, in which they stated that *Louis Martin* had, in the character of executor of *Claude Martin*, possessed himself of various sums of stock, and other property, and prayed for an account, in the usual manner, of the property of *Claude Martin*, which had thus come into the hands of *Louis Martin*.

The answers of the defendants to this bill, were taken under a commission, and were not filed until about the 24th *July* 1823. That of the appellants *Christophe Martin, Marie Desgranges Martin*, and

Francois Martin, admitted that *Christophe Martin* had obtained letters of administration to *Claude Martin,* from the Prerogative Court of *Canterbury ;* and *Christophe Martin* stated, that it appeared from *Louis Martin's* accounts, that he had possessed himself of stock belonging to the testator, *Claude Martin,* to the amount of £45,707. 9. 5. sterling, or thereabouts, with which it appeared, that he had paid all the testator's legacies to his relations in *France,* except one to *Pierre Martin,* who died in the testator's lifetime ; but they denied that they had possessed themselves of any part of the property of *Claude Martin,* or *Louis Martin,* because the succession of *Louis* had, by the laws of *France,* been accepted, *sous benefice d'inventaire* ; and they submitted that what was due from the estate of *Louis* to that of *Claude Martin,* ought to be paid into the hands of *Claude's* executors in *Europe,* but they stated that such account was the subject of a suit at that time in the French tribunal.

The answer of *Pierre Balloffett* and *Claudine* his wife, was to a similar effect ; except that they admitted having received 40,000 francs from *Louis Martin,* on account of the legacy left to *Claudine,* by the testator *Claude Martin.*

No account of the application of the sum of £45,707. 9. 5., was ever given to the Supreme Court, though in a subsequent stage of the proceedings, an admission was stated to have been made by the French legatees, before the Master, of their having received from *Louis Martin* their legacies, amounting to 1,85,000 rupees, or about £23,125 sterling.

On the 16th *August* 1819, by an order of the Supreme Court, the three first-mentioned causes, of the *Advocate-General* v. *Palmer,* the *Mayor of Lyons* v.

Palmer, and *Martin* v. the *Advocate-General,* were consolidated, and the Master was directed to take an account of the rents and profits of the testator's real estates out of *Calcutta,* come to the defendant's possession; that the parties to the two latter suits, should be parties to the account then taking in the Master's Office, in the suit of the *Advocate-General* v. *Palmer,* and be bound by it; that the Master should make one report in the three causes; and that 20,000 rupees should be paid out of the assets in the hands of the executors, to the agent of the Mayor of *Lyons,* on account of the legacy mentioned in the 25th clause of the Will, for the liberation of prisoners at *Lyons.*

On the 25th *November* 1822, the Master made his report in the three consolidated suits, whereby he found that the personal estate of the testator, and the rents and profits of his real estate, as well out of, as in *Calcutta,* and come to the hands of *Palmer* and *Deverinne,* after giving credit for necessary disbursement, and making all just allowances, amounted, on the 31st *October* then last, to sicca rupees 28,55,963. 5. 4., and the particulars of which he therein set forth; and after stating, that he caused the usual advertisements for creditors and legatees to be made, but that no creditor or legatee had come in before him (the several claims under the 25th article of the testator's Will having been satisfied under the commission directed in the first-mentioned suit, and that the sum of £25,833. 6. 8. was admitted to have been paid by *Palmer* on account of such claims), he proceeded to set forth who were the several persons next of kin of the testator at the time of his decease.

This report was confirmed without opposition, on the 29th *November* 1822.

1836.

MAYOR OF LYONS
v.
EAST INDIA COMPANY.

On the 2nd *December* 1822 a decree on further directions was made by the Supreme Court, by which it declared, that *Palmer* and *Deverinne* had fully accounted, and ordered them to pay in the balance in their hands, and that thereupon they should be absolutely discharged, and exonerated from the trusts and executorship of General *Claude Martin's* Will, and that the Accountant-General should be appointed receiver of his real estates ; and then, after directing some inquiries as to a supposed indemnity-bond from *Palmer,* which on inquiry was found never to have been given, it declared, that interest was payable on the 2,00,000 rupees bequeathed to the town of *Calcutta,* from the 30th *September* 1801, being twelve months from the testator's death, to the 6th *September* 1816, when that sum was paid into Court by *Palmer* and *Deverinne;* and it directed the Master to inquire whether the estate of the testator, was adequate and sufficient to pay the additional bequest of 1,50,000 rupees, given by the 24th article of the Will to the town of *Calcutta,* after providing for every other article of it, and for the payment of the annual pensions, gifts and institutions therein mentioned ; and if the Master should so find, it declared the town of *Calcutta* entitled to this additional sum, with interest from the time the assets should be found sufficient for such payment. It then proceeded to establish, in a similar manner, the bequests to the city of *Lyons,* and to direct the payment, with interest, credit being given for so much of them as had been already paid, and to direct the Master, to inquire what principal sum would be sufficient to raise sicca rupees 4,000 annually, for the liberation of prisoners detained at *Lyons,* for small debts, and the rates of interest borne by the Government securities, in which the funds of the testator had been invested, since they came into the hands of *Palmer* ; and the Accountant-General was ordered to pay, and allow interest on the bequests to *Calcutta* and *Lyons* accordingly ; and the Master was ordered to inquire and set apart, a certain sum for the payment of the testator's annual and monthly pensions, and 4,000 rupees for *Boulone* and *Sally's* tombs, as directed by the 30th article of the Will ; and to inquire what sums had been already expended, and what would be sufficient for the keeping up the establishment at *Constantia* House, and provide for the repairs of the testator's, *Sally's* and *Boulone's* tombs ; and that such sums should be set apart, together with that necessary for the payment of the pensions in the first instance. The Master was also to ascertain, whether the foundation and establishment of the College, by the 33rd clause of the Will directed, to be attached to the foundation of the house, and the bequest of 4,000 sicca rupees *per annum,* for the liberation of prisoners for debt at *Lucknow,* could, with reference to the intentions of the testator, and the sanction and disposition of the Government at *Lucknow,* be carried into effect, and in what manner ; and if it could, he was to allow interest on 1,00,000 sicca rupees, bequeathed for the establishment of the College, from the 30th *September* 1801 ; and he was to inquire the amount of the principal which would produce 4,000 rupees annually, in the same way as for the sum bequeathed for the prisoners at *Lyons* ; and to inquire what sums of money had been paid to, or received by, *Louis Martin,* or by any person on his behalf, or his representatives, and how the same and every part thereof, had been applied and disposed of ; and also to inquire who were the five poorest relations and nearest of kin of the testator, and to set apart 20,000 rupees with interest for them, according to the 20th article of the Will; and he was to inquire whether the Will was duly executed and attested according to the Statute of Frauds, so as to pass real estates at *Calcutta*; and it declared the proceeds of a house mortgaged to the testator, and sold since his death, to be personal estate; and it declared that the real estate of the testator, situate in *Calcutta,* was of the nature of freehold estate, and that the heir-at-law of the testator, according to the law of *England,* was entitled thereto, and to the rents and profits thereof, if the Will was not duly executed; and the Master was to inquire who was the testator's heir-at-law and next of kin, according to the English and Mahomedan laws, and what was the domicile of the testator in his lifetime, and at the time of his death; and whether by the laws and usages obtained at *Lucknow,* the inheritance and succession of deceased persons, being European Christians, were regulated by the Mahomedan law, or by the law of the place or country of the birth, or by what other law or usage; and the Master was to report whether there would be any residue of the testator's estate, and directions were given for taxing the costs of all parties.

In *October* 1828 the Master made a separate report as to the payment of the pensions, to the different legatees then living. On the 3rd *February* 1830, the Master made his general report, by which, after stating the rate of interest in the Government securities, during the periods he was directed by the decree, he found that 3,11,300 sicca rupees were sufficient for the payment of the legatees and annuitants then living; that the bequest of the sum of 4,000 sicca rupees for the liberation of the prisoners at *Lucknow* could not be carried into effect; that the Will was signed, sealed, and delivered as his Will by the testator in the presence of three witnesses; that the annexed pedigree showed that *Marie Desgranges Martin, Christophe Durand Fleurie Martin, Charles Cavier, Marie Martin,* and *Catherine Charlotte Martin,* were the next of kin and personal representatives by the law of *England* of the testator, and that by the Mahomedan law, (which makes no distinction between heirs and next of kin,) the property of the testator would be divided as therein mentioned; that at the time of his death the testator was domiciled at *Lucknow*; that sicca rupees 68,698 would be a proper sum for repairing the establishment at *Constantia* House, and that sicca rupees 2,01,000 would be sufficient for keeping up the establishment, and providing for the repairs of the buildings and tombs there; and that there was not before him sufficient evidence to decide, whether the foundation and establishment of the College, directed to be attached to the establishment at *Constantia* House, could, with reference to the disposition or sanction of the *Lucknow* Government, be carried into effect; but as no further evidence was likely to be obtained, he attached to his report the evidence relating thereto.

The evidence annexed to this report, consisted of a correspondence between the officers of Government, and the Master, and the copies of two letters from the Resident at *Lucknow* to Government, the first of which was as follows :—

"To *G. Swinton*, Esq., Secretary to the Government, in the Political Department, *Fort William.*

"SIR,

"I have the honour to acknowledge your letter of the 28th ultimo, with its enclosure, directing me to report if any correspondence had taken place subsequent to the 4th *April* 1818, relative to certain bequests of the late General *Martin*.

"I beg you will inform his Excellency the Right Honourable the Vice-President in Council, that I do not find in the records, any correspondence on these subjects, subsequent to that date; but I have reason to believe my predecessors had, and I myself have had, frequent conversations with his Majesty relative to these bequests, and a disinclination has ever been evinced to allowing them to be carried into effect, arising principally from that feeling so general among the native powers of *India*, that it would derogate from their dignity, and be a reflection on their liberality and on their power, to allow even an individual in their own dominions, much less a subject of a foreign State, to found institutions which, in their opinion, are the exclusive privilege and right, of rulers.

"To the objections thus raised are to be attributed the hitherto silence regarding General *Martin's* most charitable and liberal purposes; and I am not yet prepared to hold out expectations that the King of *Oude* will consent to carry the intentions into effect; but I shall endeavour to impress on his mind, that his dignity and liberality cannot be injured by his sanctioning that which will so benefit the rising generation, and the present poor; and as that without his sanction, and indeed warm assistance, General *Martin's* Will cannot be fulfilled, whatever praise and respect may be given to the charitable founder, will, in much greater degree, be reflected on his Majesty, who, after the lapse of so long a period, and notwithstanding the many prejudices against the measure, has, from his own innate philanthropic feeling, effected the so-much-wished-for objects.

"I have, &c.

(Signed) "M. Ricketts, Resident.

"*Lucknow* Residency, 19*th May* 1827."

The second letter from the same party to Mr. *Sterling* was in these terms :—

"Sir,

"I have now the honour to acknowledge the receipt of your letter of the 30th *May* last, enclosing copy of a letter from the Master of the Supreme Court, and to forward a copy and translation of a letter just received from the King of *Oude*, after several personal and written applications on the subject to him, relative to the charities proposed to be established within his Majesty's dominions, under the will of the late General *Martin*. The King of *Oude* is far from being anxious for the establishment of these charities, and declines altogether to receive the sum proposed for the liberation of debtors, under the plea, that those in confinement are principally for the crime of theft and murder; but his Majesty makes no objection to the establishment of the College within the precincts of *Constantia* House, though he holds out no expectation of encouraging this so charitable and beneficial an institution by his countenance and support.

"I have, &c.

(Signed) "M. Ricketts, Resident.

"*Lucknow* Residency, 4 *Sep.* 1828."

The enclosed letter of the King of *Oude* was dated 21st *Suffer* 1244. H. (3 *September* 1828) to the address of

M. Ricketts, Esq., Resident at *Lucknow,* and was as follows :—

"I have received your letter of the 23 *Zeehijjah* 1243 *Hijee* (7th *July* 1828), and official note of the 13th *Suffer* 1244. H. (26th *August*), on the subject of carrying into effect the charities of the late General *Martin,* and establishing a college agreeably to his Will, and in conformity to the instructions of the Honourable the Governor-General in Council.

"The case is, that the prisoners at *Lucknow* are in most instances confined for theft and murder, and consequently their release is impracticable; but I have no objection to allow the establishment of a college within the precincts of *Constantia* House."

Two exceptions were taken to this report on behalf of the appellant, the Mayor of *Lyons* :—First, that the Master had found the testator domiciled in *Lucknow,* whereas, as a military officer continuing in the service of the East India Company, he had acquired and retained the domicile of a British subject; and secondly, because he had not found whether the intentions of the testator as to the College at *Lucknow,* could be carried into effect.

On the 1st *March* 1830, these exceptions were allowed, and on the 19th *July* 1830, the Master made his amended report, by which, amongst other things, he found that the sum of 2,68,500 rupees would be sufficient to be appropriated for the payment of the superintendent and other persons, directed by the testator to be employed about *Constantia* House; that he had been unable to ascertain what had been received by *Louis Martin,* but that, by the admission of the parties, legacies had been paid by him of which a list was annexed, amounting to 1,85,000 rupees, or about £23,125; that there was no

1836.

MAYOR OF LYONS v. EAST INDIA COMPANY.

evidence adduced, by which he could report who were the five poorest relations of the testator, or who was his heir-at-law, or his heir-at-law by the English law; and with reference to the domicile of the testator, he reported that he was a Frenchman by birth, and he also reported at considerable length the circumstances of his entering the military service of the East India Company, and *Nabob* of *Oude*, and of his residing at *Lucknow*. And he further reported that the legacies and charitable bequests, except the one to *Pierre Martin*, which had lapsed, had been paid, and that there was then, in the hands of the Accountant-General, to the credit of the cause, sicca rupees 17,51,153. 11. 10., from which, if the several sums set out in detail, to be appropriated for the keeping up the establishment and college at *Constantia* House, for the liberation of prisoners, and for other purposes, in obedience to the testator's Will, were deducted, there would remain a residue of rupees 3,48,797. 9. 10. ; but if the Court should be of opinion that the Will was duly executed, so as to pass real estates at *Calcutta*, the further sum of 2,48,400 sicca rupees must be deducted from this sum, so as to leave an ultimate sum of rupees 1,00,397. 9. 10.

On the 4th *November* 1830, the three consolidated causes came on for hearing on further directions, and they were argued on that, and several following days. The Court took time to consider its judgment, which it delivered on the 7th *February* 1831. Two sets of Minutes of this decree were afterwards delivered out by the Registrar of the Supreme Court : no decree was however drawn up from them, and two petitions for a re-hearing were presented, one by the appellant, the Mayor of *Lyons*, and the other by the appellants, the next of kin of the testator.

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

The three consolidated causes were accordingly reheard, together with the cross cause of *Palmer* v. *Martin,* which was heard on bill and answers, on the 8th and several following days in *July* 1831. No judgment was then pronounced, but the causes were, on the 25th *July,* ordered to stand over, and a reference was directed to the Master, to inquire whether the Governor-General in Council, had the means of giving effect to the charitable intention, and directions in the said Will mentioned, respecting the testator's tomb, and *Constantia* House, in case the Court should decree the funds which might be applicable under the Will, to be placed at the disposal of the Governor-General in Council, or any person or persons, duly authorized, and appointed by the Governor-General in Council, to receive the same; and whether the Governor-General in Council was willing, and would consent to receive and appoint any person, or persons in *Calcutta,* to receive the funds or the interest arising thereon for the purposes aforesaid.

On the 5th *November* 1831, the Master made his report, by which he found that the Governor-General was willing to receive and apply such sums, as the Court might decide, to be applicable to the *Lucknow* bequest of General *Claude Martin*; and he annexed a copy of the correspondence between the attorney to the East India Company and the secretary to the Government, to his report, and which was as follows :—

"To *G. Swinton* Esq., Chief Secretary to Government, Political Department.

"Sir,

"The Supreme Court having expressed a wish, to know whether the Government would lend its aid to carry into effect, certain provisions of the Will of the late General *Claude Martin,* I beg to state for the information, that the Honourable the Vice-President in Council, that the Will contains the accompanying clause relative to the *Luckaparah* or *Constantia* House at *Lucknow.* In consequence of the reference made by the Judges to the Advocate-General, I am requested by him to ascertain for their information, whether the Government will afford its aid, to carry the objects of the enclosed clause of the Will into effect, particularly as it regards the establishment of a college therein mentioned, and the disbursement of the funds, which may be appropriated for keeping up the establishment, if any such be formed. Owing to *Luckaparah* or *Constantia* House being out of the British territories, the Supreme Court is unable to exercise any control or superintendence over any such establishment there, as is mentioned in the General *Martin's* will, and is therefore desirous, before making any decree, relative to the keeping up of the house, or the formation or otherwise of such a college, to know whether the Government will afford any aid upon the subject.

"I am, &c.

"R. MOLLOY,

"Officiating Attorney to
"the Honourable Company.

"*Fort William,*
"30th *November* 1830."

"To *R. Molloy,* Esq., Acting Attorney to the Honourable Company.

"SIR,

"I am directed by the Honourable the Vice-President in Council, to transmit to you a copy of the reply, which has been received from the Secretary in attendance on the Governor-General, to the reference on the subject of your letter to my address, of the 30th *November* last.

"I have, &c.
"GEORGE SWINTON,
"Chief Secretary to Government.

"Council Chamber,
"7th *January* 1831."

"To *G. Swinton*, Esq., Chief Secretary to Government,
Fort William.

"SIR,

"I am directed to acknowledge the receipt of your letter dated the 3rd instant, and in reply, to state that the Governor-General has no hesitation, in authorizing an assurance to be conveyed to the Supreme Court, that the services of the British officers at *Lucknow*, will always be available, to superintend any public establishment which the Court may adjudge to be required, for the execution of the Will of the late General *Claude Martin*, and to control the appropriation of any funds, or allowances which may be assigned by the Court for that purpose.

"I have, &c
"H. T. PRINSEP,
'Secretary to the Government.

"General Camp,
"*Arnwood, Bundlecund,*
"*December* 28th 1830."

"To *G. Swinton*, Esq., Chief Secretary to Government.

"SIR,

"I beg to acknowledge the receipt of your letter of the 7th *January* last, with its enclosure, being a copy of a letter from the secretary to the Governor-General, in which it is stated, that the Governor-General has no hesitation in authorizing an assurance to be conveyed to the Supreme Court, that the services of the British officers at *Lucknow,* will always be available to superintend any public establishment, which the Court may judge to be required, for the execution of the Will of the late General *Claude Martin,* and to control the appropriation of any funds or allowances, which may be assigned by the Court for that purpose. This has been duly communicated by the Advocate-General to the Judges of the Supreme Court, who have proposed to make it a part of their decree, that the Supreme Court is incompetent, and unable by itself, to give effect to the other bequests for charitable establishments and institutions at *Lucknow,* which is a place beyond the jurisdiction of this Court, and not forming any part of the Presidency of *Fort William,* in *Bengal*; but that the Governor-General of *Fort William,* has at present the means, and is able to give effect to the same, and hath signified to the Court, through the Advocate-General of the East India Company, that the said Governor-General in Council is willing for that purpose to receive and apply such sums as the Court may decide to be lawfully applicable for those purposes. The Chief Justice called on the Advocate-General to state, whether this was the proper construction to put upon the passage I have cited, from the letter of the secretary of the Governor-General to a question of this kind; the Advocate-General did not feel himself at liberty to give any answer, but by a reference to the words of the letter itself; which he thought sufficiently explicit. The Chief Justice, however, requested him to obtain the opinion

1836

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

of Government on the subject, and to ascertain whether the meaning conveyed in the words of the proposed decree is that which the Governor-General intended to convey in the letter; at his request, therefore, I communicate this question to you; and you will oblige him by submitting it to the consideration of the Government; he begs me to express the unwillingness he feels at giving this trouble; but on a subject so much out of his own province, and so entirely of a political nature, he feels it would be improper in him to take any step except under the direction of Government.

"I have, &c.

"R. MOLLOY,
"Officiating Attorney to
"the Honourable Company.

"*Fort William,*
"18th *June* 1831."

"To *R. Molloy,* Esq., Acting Attorney to the Honourable Company.

"SIR,

"I am directed to acknowledge the receipt of your letter of the 18th instant, and to acquaint you in reply, that a reference on the subject of it will be made to the Right Honourable the Governor-General, and the result be communicated to you, for the information of the Advocate-General.

"I have the honour to be, &c.

"GEORGE SWINTON,
"Chief Secretary to Government.

"Council Chamber,
"22nd *July* 1831."

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

"To *R. Molloy,* Esq., Acting Attorney to the Honourable Company.

"SIR,

"With reference to my letter of the 22nd *July* last, I am directed to inform you, that an answer has been received from the Right Honourable the Governor-General, to the reference made to him, on the subject of the construction, to be put on the terms of Mr. Secretary *Prinsep's* letter of the 28th *December* 1830; his lordship has observed in reply, that although he would have preferred, that the Supreme Court should have declared, what particular establishment and institution should be maintained at *Lucknow,* so that the duty of the Government officers should be confined, to the execution of the Court's order and decree concerning them, still, if the Court desire to leave the entire matter, as affects the *Lucknow* bequests of General *Claude Martin,* to the Government, his lordship sees no objection to the transfer of this duty, to the agent of the Governor-General at that capital. I am accordingly directed to state in the words of proposed decree, that the Government is willing to receive and apply such sums, as the Court may decide to be applicable to such purposes.

"I have the honour, &c.

"GEORGE SWINTON.

"Chief Secretary to Government.

"*Fort William,*
"2nd *September* 1831."

The report of the Master was confirmed by an order of Court, on the 29th *November* 1831.

On the 23rd *February* 1832, the Court made its decree in all the four cases. The principal parts of this decree, which was divided into nineteen articles, were, that the Court found in the second article, that the

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

testator General *Martin,* was at the time of his death an alien, who had acquired an English domicile, during his service under the United Company, and the British Company in *India,* which domicile he retained at the time of his death. In the third article it found, that the testator at the time of his death had no relations by the whole blood, nor any heir-at-law, according to the English law. In the fourth article it found, the different persons who were his next of kin, according to the law of England.

In the fifth article the Court declared, that the Will was duly executed in the presence of three credible witnesses, in such manner as would be sufficient, according to the English law, to pass real estates; but that the testator having been by birth a subject of the King of *France,* and at the time of his death an alien, his lands and houses at *Calcutta* (except his interest in the *Chand Paul Ghaut* House, which was held by him in mortgage, and which had been declared to be personal estate, by the decree of the 2nd *December* 1822) did not pass by his Will; but that there were not proper parties to the suits, nor sufficient evidence before the Court, as to the lands or houses, or other immoveable property situate beyond the boundaries of *Calcutta,* but in places which at the time of the death of the testator were within the Presidency of *Fort William,* or some of the provinces subject to or forming part of the Presidency, to enable the Court to determine whether the same could or did pass by the Will; and as the Attorney-General was not resident within the jurisdiction of the Court, there was no party to the suit who had made any claim to the lands and houses, or other real or immoveable property; and on the part of the Crown it directed the Receiver to receive the rents and profits, of the said immoveable property, both within *Calcutta* as out of it, in the Presidency of *Fort William*, and to pay the same into the hands of the Accountant-General of the Court.

The decree then proceeded in the sixth article, to give directions, that the amount of the rents and profits of such immoveable estate, together with the accumulations thereon, should be carried to a separate account, to abide any claim which might thereafter be made on behalf of the Crown, and that the future rents and profits and produce of sales of such immoveable property, should be carried to the same account.

In the seventh article the Court declared, that the intent and meaning of the testator was, that the payment of his debts and legacies should first be made, and a sufficient sum set apart and secured for the payment of the several pensions, and for the completing and maintaining of the several buildings, charitable institutions, and establishments in the Will mentioned, or so many of them as could be lawfully, and effectually, established, and maintained; and for the payment of all salaries, wages and allowances in the Will provided for supervisors, servants and other persons to be employed in and about the buildings, institutions, and establishments, or any of them; and that after making such payments and provisions, if it should be found, that the sum remaining would exceed ten lacs of rupees, the whole of such surplus should be divided into three equal portions, which should be respectively appropriated and applied, as far as they could lawfully be applied, to the same charitable institutions, establishments, and uses, at *Calcutta, Lyons,* and *Lucknow,* to which certain other sums were bequeathed, and made applicable by the preceding provisions of the

Will; and if it should be found that the sum so remaining as aforesaid, after making all such payments and provisions as should be less than ten lacs, then the whole should be divided, and applied in the same way and for the same purposes, as it had been stated it was the intention of the testator in the aforementioned cases, that the surplus, if it should at first exceed ten lacs, should be divided and applied.

In the eighth article the Court declared, that the legacy to *Pierre Martin* had lapsed; that all other legacies, except the pensions, salaries and allowances, had been paid and satisfied; and that 1,50,000 sicca rupees, bequeathed by the twenty-third article of the Will for the poor of *Calcutta, Lucknow,* and *Chundernagore,* and a further sum to provide for the payment annually of the 5,000 and 1,000 sicca rupees directed by the twenty-eighth article of the Will to be paid for the release of prisoners for debt at *Calcutta,* had been paid by *John Palmer,* under an order of the Court, into the hands of the Accountant-General of the Court, in a cause in which *Ralph Uvedale,* Esq., the clerk of the Crown, at the relation of *Thomas Christenson,* was the informant, and *John Palmer* and others, defendants.

In the ninth article the Court declared that sicca rupees 3,12,090. 7. 8. had been set aside, for the payment of pensions at *Lucknow.*

In the tenth article it declared, that a fund had been set apart for a charitable institution at *Calcutta,* which, on the 31st *December* 1830, amounted, with the accumulations, but after deducting the purchase-money of certain lands for the purpose, to sicca rupees 8,82,856. 1. 7.

In the eleventh article it declared, that 2,50,000 sicca rupees, bequeathed for a charitable institution at *Lyons*, together with all interest on it, and a sum sufficient to satisfy the bequest of 4,000 sicca rupees, to be paid annually for the liberation of prisoners there, had been fully paid and satisfied.

In the twelfth article the Court declared, that large sums had been retained by the executors residing at *Lucknow*, for the purpose of being applied in making the tomb, buildings, gardens, and establishments, directed by the Will of the testator.

In the thirteenth article the Court declared, that the form of government of *Lucknow*, and the circumstances of the country, made it impossible that any effect should be given to the bequest of sicca rupees 4,000 directed to be paid annually for the liberation of prisoners at *Lucknow*, in the thirty-third article of the Will ; and that such bequest was consequently void, and that the Court was consequently, incompetent and unable by itself, to give effect to the other bequests for charitable establishments, and institutions at *Lucknow*, which is a place beyond the limits of the jurisdiction of the Court, and not forming any part of the Presidency of *Fort William*, in *Bengal;* but that the Governor-General in Council, of *Fort William*, in *Bengal*, had the means and was able to give effect to the same, and that the same ought to be carried into effect; and that it appeared by the report of the Master under an order made in these causes on the 25th *July* 1831, and which report is dated the 5th day of *November* 1831, that the Governor-General in Council was willing to receive and apply such sums as this Court might decide to be lawfully applicable for those purposes. And forasmuch as the testator, *Claude Martin*, in and by the thirty-third article of his said Will, had expressed his desire and intention, that in case it should be necessary, the protection and assistance of the Government should be obtained, for the purpose of giving effect to the said last-mentioned bequests and testamentary dispositions, the Court did further agree and declare, that if the whole sum of sicca rupees 2,00,000. bequeathed in the thirty-third article of the Will of the testator, *Claude Martin,* for the furnishing the house of *Constantia,* had not been expended and applied for that purpose, whatever might remain thereof, ought to be set apart from the funds then standing to the general credit of these causes, and applied as a building and repairing fund for the house and establishment at *Constantia,* and ought for that purpose to be paid to the Governor-General in Council, or some other person duly nominated and appointed by the Governor-General in Council, to receive the same; and that out of the same funds, standing to the general credit of these causes, a further sum of sicca rupees 1,00,000 for the support of a college and school at *Lucknow,* bequeathed in the thirty-third article of the Will, together with accumulations of interest on the same, from the death of the testator, until the setting apart of the same, ought also to be set apart, and the interest thereof from time to time, as the same shall accrue and be received, ought to be paid to the Governor-General in Council, or to some person whom the Governor-General in Council for the time being shall duly nominate and appoint to receive the same, in order that the same may be applied to the purposes in the thirty-third article of the Will mentioned; and that out of the fund standing to the general credit of these causes, the further sum of three lacs of rupees ought to be set apart, and the interest thereof paid to the Governor-

General in Council, or to such person or persons as the Governor-General in Council shall nominate and appoint, in order that there may always be allowed and paid the salaries and allowances for supervisors, servants, and other attendants and persons to be employed in and about the tomb, buildings, and establishments at *Constantia* in the Will mentioned (which the decree then recapitulated), amounting in the whole to the sum annually of sicca rupees 12,228; and the Court then proceeded to direct the payment of any sum of money which had been expended in the necessary care and superintendence of the establishment at *Constantia,* under the directions or authority of the Master or Accountant-General of the Court.

By the fourteenth article, it was referred to the Master to inquire, what part of the funds in the cause had arisen from the rents, profits, or interest thereon of the lands or houses situate in *Calcutta,* (with the exception of the house *Chand Paul Ghaut,*) and also what houses, lands, or other real immoveable property beyond the property of *Calcutta,* but within the Presidency of *Fort William,* were in the hands of the testator at the time of his death; and what was the nature of the tenure thereof, and the estate and interest of the testator therein; and what regulations and usages have prevailed, and now prevail in the said provinces beyond the boundaries of *Calcutta,* as to the right and power of European aliens to devise or bequeath by will any lands, houses, or other real immoveable property of which they may be possessed at the time of their death within the provinces, and all further inquiries as to whether any such immoveable property had been sold, and what part of it the Receiver-General of the Court was in possession of, and the amount of the rents and profits received, and the proceeds of the sales.

By the fifteenth article, the Master was directed to inquire whether the sums paid to the Accountant-General in the case of *Uvedale* v. *Palmer,* were sufficient to provide for the charitable bequests and purposes, for which they were directed to be set apart, and paid, or what further sum might be required, to be retained, and set apart for that purpose.

By the sixteenth article the Master was directed to inquire, what pensioners of the said testator's were then living, and whether any part of the 3,11,300 sicca rupees as had been set apart for the payment of such pensions might be transferred back to the funds standing to the general credit of the cause ; and to state some plan by which the payments might be conducted, so as to prevent all frauds, and provide for a gradual transfer back of the whole to the general credit of the causes as the pensioners should die.

By the seventeenth article the Master was directed, to inquire whether the whole 2,00,000 sicca rupees allowed by the thirty-third article of the Will, had been applied to that purpose, and what sum would be sufficient to satisfy the bequest of sicca rupees 1,00,000 for the establishment at *Lucknow,* in the thirty-third article of the Will mentioned, together with the accumulations of interest thereon from the testator's death; and also to inquire whether any sums were due to persons employed about the said establishment.

By the eighteenth article the Master was directed, to inquire and report, what surplus remained out of the funds standing in the general credit of the cause, after making provisions for all the payments, reservations, and appropriations to separate accounts, and other matters and things by this decree ordered and directed.

The nineteenth article contained the usual directions as to the taking of the accounts, that all parties should be allowed their costs as between attorney and client, and reserved further directions.

On the 20th *August* 1832, the appellants presented separate petitions to the Supreme Court, for leave to appeal from the above decree to His Majesty in Council, which was duly granted by an order made on the 9th *December* 1833, in pursuance of which two petitions of appeal were lodged against the decree, one by the Mayor of *Lyons*, and the other by *Christophe Martin, Marie Desgranges Martin, Pierre Balloffett* and *Claudine* his wife, and *Francois Martin*.

Pending the proceedings before the Supreme Court, an agreement was entered into at *Lyons*, between the *Baron Rambaud*, the then Mayor of the city, acting and stipulating on behalf of the city, of the one part, and the next of kin of General *Martin* of the other, whereby it was agreed, that as well the sums that the city of *Lyons*, as the next of kin of the testator, might be ultimately decreed entitled to, arising from the real and personal estate of the testator, should form one common fund, and that after raising and paying thereout to the Mayor of *Lyons* the sum therein mentioned, towards defraying the charges of recovering and remitting from *India* the legacies given for the benefit of the city, and already received from *India*, the common fund so created, should be divided into five parts, whereof four-fifths should be taken by the next of kin, to be divided between them according to the respective rights of each, and the remaining one-fifth by the city of *Lyons* ; and the parties thereto did agree that the right in which they contracted, comprised all sums whatsoever, which should constitute the residue of the succession of Major-General *Claude Martin,* as well any residue less or greater than £100,000 sterling, and likewise the £100,000 sterling itself, or the ten lacs of rupees mentioned in the 33rd article of the will, in such manner that the division of the residue should be made in the proportion before mentioned, whether that residue be decreed in the whole or in part to the next of kin, or whether in the whole or in part to the city of *Lyons,* and the establishments in the same class with it; or whether it should be in an equal or unequal portion to the next of kin, to the city, and to the other establishments ; and it was declared that the agreement should only be executory, until it should have obtained the approbation of the Municipal Council of the city of *Lyons,* of the Prefect, and the sanction of the King of *France,* which was afterwards expressed by a royal ordinance of the late King *Charles* X.

In consequence of the above agreement and ordinance, the appellants presented a petition to His Majesty in Council, praying that the two appeals might be consolidated and heard together, and that one case might be delivered in jointly by the appellants ; which, upon the consent of the Attorney-General (who claimed an interest for the Crown), and the counsel for the East India Company, was directed.

The appellants submitted by their petition of appeal, that the decree or decretal order of the 25th *July* 1831, and the order of the 29th *November* 1831, confirming the report of the 5th *November* 1831, and also the decree of the 23rd *February* 1832, were erroneous, and ought to be reversed or altered, for the following amongst other reasons :—

Because the decree of the Supreme Court of 2nd *December*, 1822, having declared that the real estate of the testator, situate in the town of *Calcutta*, was of the nature of freehold estate, and that the heir-at-law of the testator, according to the law of *England*, was entitled thereto, and to the rents and profits thereof, (if it should be found that the testator's Will was not duly executed, so as to pass real estate, according to the Statute of Frauds,) it was not competent to the Supreme Court to reverse its own decree of 2nd *December* 1822, by another decree of the 23rd *February* 1832, and on the suggestion of the Court itself, and not upon any claim or suggestion made by any of the parties to the suits ; and to declare, in effect, that the testator being at his death an alien, the real estate in *Calcutta*, had devolved on His Majesty, in virtue of his prerogative royal.

Because such declaration is contrary to law, for that the law of alienage, whereby real estate situate in this country, possessed by aliens, becomes forfeited to the Crown, forms no part of the laws of this country adopted in any of our possessions in *India*.

And because the decree of 23rd *February* 1832, ought to have declared that the real estate passed by the testator's Will, and was thereby devised with, and formed part of, the general residue of the testator's estate.

Because the third declaration or provision in the decree of 23rd *February* 1832, that the testator at the time of his death had no relations of the whole blood, or any heir-at-law, according to the English law, was not founded on any evidence taken in the causes, and is contrary to the fact, the testator having at his death a first cousin, resident at *Lyons* in *France*, he being the only son of the eldest brother of the whole blood to the testator's father, and the heir of the testator by the English law.

Because the true construction of the testator's Will as to the bequests contained therein, relating to the establishment of the college for charitable purposes at *Lucknow*, is, that such charitable bequests have failed, for the reasons stated in the decree of 23rd *February* 1832, viz. :—"that the form of government at *Lucknow*, and the circumstances of that country, make it impossible that any effect should be given to the bequest for liberation of prisoners at *Lucknow* ; and that the Supreme Court is incompetent and unable by itself, to give effect to the other bequests for charitable establishments and institutions at *Lucknow*, which is a place beyond the limits of the jurisdiction of the Court, and not forming any part of the Presidency of *Fort William* in *Bengal*;" and the Supreme Court had not power to direct the payment of any funds, for the purposes of the *Lucknow* College, to the Governor-General in Council ; but that upon the same charities not being capable of being carried into execution from any cause whatever, the right of the next of kin and heir or heirs respectively of the testator thereupon accrued to the sums and property given for such purposes, as being undisposed of by the testator's Will.

Because the true construction of the testator's Will, as to the disposition of the residue, is, that if after payment of his debts and legacies, the residue (including in such residue as well the real as the personal estate) exceed £100,000 sterling, or about ten lacs of sicca rupees, the sum of ten lacs is to be applied as to one-third thereof, in increase of the charitable institutions directed by the Will to be established at *Lyons*, and

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

one other third, in increase of the charitable institutions, directed by the Will to be established at *Calcutta,* and as to the remaining one-third thereof, given by the Will, for increasing the charitable institutions at *Lucknow,* the bequest thereof has failed ; and that such part of the last-mentioned one-third, as consists of, or has arisen from, the personal estate, is distributed among the next of kin of the testator ; and such part thereof as has arisen from the real estate, amongst the heir or heirs of the testator, according to the laws of the country, where such real estate is situate ; and also, that any residue there may be, of the testator's real and personal estates, not amounting to, or any there may be exceeding, the said sum of ten lacs of sicca rupees, is by the Will undisposed of, and ought in the like manner, as to such part thereof as consists of personalty, to be distributed amongst the testator's next of kin ; and as to such part thereof as consists of real estate, among the heir or heirs of the testator, according to the law of the country, where such real estate is situate.

Because the reference to the Master, by the order made on the re-hearing of the causes on the 25th *July* 1831, and the Master's report of the 5th *November* 1831, made in pursuance of the same order, was altogether an irregular proceeding ; and that the same report, ought not to have been acted on by the Supreme Court, having been made, not only against law, because the Supreme Court has no power to direct payment of any part of the testator's funds to the Governor-General in Council, but also without evidence duly taken ; and moreover, directly against the finding in the Master's amended report, of 19th *July* 1830, made in pursuance of the decree of 2nd *December* 1822, (and which report was duly confirmed,) in which report it is found, that the establishment of the college at *Constantia,* and the bequest of 4000 sicca rupees *per annum* for the liberation of debtors at *Lucknow,* could not, with reference to the intention of the testator, and the sanction and disposition of the government at *Lucknow,* be carried into effect ; such amended report having been made, in pursuance of an order of 1st *March* 1830, allowing exceptions to the former report of the Master, of 3rd *February* 1830, finding that he had not before him sufficient evidence, to decide the point.

Because the sum of three lacs of sicca rupees, directed by the decree of 23rd *February* 1830, to be set apart for payment of the 12,228 sicca rupees *per annum,* for salaries to attendants employed about the tomb, buildings, and establishment at *Constantia,* is, even supposing the college capable of being established, an excessive sum, as it would yield, at 5 *per cent.* (the present rate of interest of the Indian government securities), 15,000 sicca rupees *per annum.*

Because it is stated in the decree of the 23rd *February* 1832, that all the legacies given by the Will, save the annuities and pensions, have been fully paid and satisfied ; the legacies given by the testator's Will, for the benefit of the poor of *Calcutta, Chandernagore,* and *Lucknow,* and for the relief of prisoners for debt, at *Calcutta,* having been, before 1822, paid by *John Palmer,* one of the executors of the testator's Will, into the hands of the Accountant-General of the Supreme Court, in the cause or information of *Ralph Uvedale,* Clerk of the Crown, at the relation of *Thomas Christenson* against *John Palmer* and others ; and therefore, the subsequent inquiry, directed in the same decree, whether the sums so paid were sufficient, and what further sum might be required, is contradictory, and ought not to have been directed, and more especially as no similar direction, is made by the decree, with respect to the legacies given for charitable purposes at *Lyons*.

Because the decree of 23rd *February* 1832, does not declare that the sum of sicca rupees 3,12,090. 7. 8., directed to be set apart to the credit of a separate account, in the books of the Accountant-General, for payment of the annuities and pensions, belongs, on the death of the annuitants and pensioners, to the next of kin of the testator, the same not being disposed of by the testator's Will.

Because, inquiries being directed by the decree of 23rd *February* 1832, as to what real or immoveable property the testator held at his death, situate beyond the boundaries of *Calcutta*, but within the Presidency of *Fort William*, or the provinces subject to, or forming part of, the Presidency, and also as to the tenure thereof, and the testator's interest therein, and his power to dispose thereof by his Will ; and respecting the rents thereof, and the accumulations of the same ; an inquiry ought also to have been directed, as to who is, or are entitled, to the real or immoveable property, and rents, and accumulations subject to the testator's power of disposition over the same.

Because, it appearing by the testator's Will, and the pleadings in the causes, that the testator had houses, lands, and other real property or immoveable property, not within the Presidency of *Fort William*, or the provinces subject thereto,—for instance, at *Lucknow*, where the Mahomedan law prevails, and elsewhere; the decree ought to have directed the like inquiries in all respects, so far as necessary, respecting such houses, lands, and real and immoveable property--the tenure thereof, and the estate and interest of the testator therein—the regulations and usages respecting the right and power to devise and bequeath the same—the particulars of the rents thereof, and who has received the same, since the testator's death, and respecting the accumulations thereof—and also, as to who is or are entitled to the same real or immoveable property, subject to the testator's power of disposition thereof by his Will, as by the same decree were and ought to have been directed, respecting the testator's real and immoveable property beyond the boundaries of *Calcutta,* but within the Presidency of *Fort William,* or the provinces subject to, or forming part of, that Presidency.

Because it being found by the Master's report of the 3rd *February* 1830, that the Mahomedan law makes no distinction between heirs and next of kin, the real or immoveable property situate in such countries, where the Mahomedan law is the law of the country, is to be considered as personal estate, subject to all the provisions of the testator's Will, and the same ought to have been so decreed accordingly ; and because, as to all the testator's houses, and lands, and real and immoveable property, as well in, as out of, *Calcutta,* the same being, as appellants are advised in fact, lawfully devised by the testator, the Court should have decreed and provided that, subject to the specific devises, bequests, and directions contained in the Will, all the testator's real and personal estates, wherever situate, should, according to the respective values thereof, bear a due proportion of his legacies, charitable and others ; and the decree should also have provided that all the estates should bear a due proportion of the costs

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

of the suits, and the proceedings in the same, or at least of some portion of such costs, or at least and so far as the apportionment could not then be made, the decree should have contained proper reservations, with a view to such ultimate apportionment of the legacies and costs, subject to the inquiries directed, or which ought to have been directed, respecting the testator's real and immoveable property, beyond the boundaries of *Calcutta.*

On the part of the respondents, the East India Company, it was suggested, that in the event of its being holden that any part of General *Martin's* estate did not pass under his Will, on account of his being an alien or otherwise, very important questions would arise, which, regard being had to the state of the proceedings in the Court below, could not be there properly raised or decided ; and the respondents further suggested, that in case any charitable bequests in the Will, could not be executed in the manner pointed out by the testator, the same would be to be disposed of by the respondents; and they submitted that the decree of the 23rd *February* 1832, ought, so far as it affected the charities at *Calcutta* and *Lucknow,* to be affirmed, for the following amongst other reasons :—

Because the bequests for distribution of alms to the poor, and the liberation of poor prisoners for debt at *Calcutta,* were valid bequests, and it was the duty of the Supreme Court, in these suits for the general administration of the assets of the testator, to inquire whether sufficient sums had been applied out of his assets for securing the payment of these bequests.

Because the bequest for the purpose of establishing a college at *Lucknow,* was a valid bequest, and ought

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

to be carried into execution, and the mode adopted by the Supreme Court to carry it into effect, was strictly regular and proper.

On behalf of the Crown, it was insisted (among other reasons), that His Majesty was entitled to all the lands, tenements, and hereditaments, situate within the town of *Calcutta,* or the Presidencies of *Fort William,* or, provinces subject thereto, of which the testator *Claude Martin,* an alien, died seised or possessed, by virtue of the royal prerogative.

That His Majesty was entitled to the 4,000 sicca rupees directed to be paid annually for the liberation of prisoners at *Lucknow,* the said bequest having been decreed to be void; the 4,000 sicca rupees *per annum* to be disposed of by His Majesty to such charitable purposes as should be advised.

Mr. *Tinney,* K.C., and Mr. *Pemberton,* K.C., for the appellants.

Mr. *Tinney,* K.C. :

In consequence of the order for the consolidation of the appeals presented in the case of the Mayor of *Lyons,* and the next of kin of General *Martin,* the appellants appear here by the same counsel. This, though a seeming disadvantage (for we must argue some points of the case in the alternative), is in reality none, for by a process familiar in *France,* though not known to us, the interest of the city of *Lyons* and the next of kin of the late General *Martin* have been united, an arrangement being made under the authority of the sign manual of the King of *France,* that whatever benefit should accrue to either party by the decision of the Court, shall be for their mutual advantage.

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

These appeals arise upon the construction and effect of the very long and complicated Will of General *Claude Martin,* a Frenchman by birth, domiciled at *Lucknow,* in the territories of the King of *Oude,* but nevertheless, in the service of the East India Company, who was possessed at the time of his death of a very large real and personal estate, both in *Europe* and in the *East Indies,* and which he has bequeathed chiefly for charitable purposes.

The suits and proceedings which have been instituted to establish, and carry into effect the provisions of this Will, are very fully stated in the papers in the appeal, and the question now comes before this Court upon two several appeals against the proceedings, and decree of the Supreme Court of *Calcutta,* upon the hearing of those suits.

Upon the effect of those proceedings, three points arise :—1. Whether the law of England as to aliens, applies to real estates in *Calcutta,* so as to prevent the lands of General *Martin* passing by his Will : 2. Whether the College of *Constantia* House, in *Lucknow,* without the territories of the East India Company, can be established by the Supreme Court of *Calcutta* : and 3. Whether the various legacies bequeathed by General *Martin,* are charged on the real, as well as the personal estate.

If this Court should be of opinion in the affirmative on the first point, and should hold with the Court below, that General *Martin,* being an alien, was incapable of devising his lands, and consequently that those situate in *Calcutta* cannot pass, then a question will arise between the Crown and the East India Company, as to whom such lands revert. With that question, however, the appellants have nothing to do, it being their business only to insist before your Lordships, that no forfeiture has occurred in consequence of alienage, either to the Crown, or the East India Company.

With regard to the second point, whether the legacy given to establish the College of *Constantia* House is capable of being carried into effect, the appellants insist, that from the evidence in the Court below, it is clear that it cannot; but if your Lordships shall be of a contrary opinion, a question will then arise, to whom the funds in question belong. The Mayor of *Lyons* contends that they must fall into the general residue, while the appellants, the next of kin, claim an exclusive title to them; and the Crown, or the Advocate-General, on the other hand, insists they must be appropriated to some other charitable scheme.

In the third place, respecting the residuary estate, the question is, to whom the residue belongs, whether wholly to the next of kin, or whether so much as is real estate is vested in the heir-at-law, or whether the whole, both real and personal, is not, by the terms of the Will, to be divided among the several charities mentioned by testator; if that be so, then so much as would go to the *Lucknow* charity, must go to the heir-at-law, so far as it is real estate, and to the next of kin, so far as it is personal. These are the points which arise in this case, which it is now my duty to bring successively before the Court.

I. With respect to the law of alienage applying in this case, it is obvious that the point has been an after consideration. No one who reads the Will of General *Martin*, can doubt that he was not an Englishman; the fact of his being a Frenchman was notorious to all *India*; and in one of the earlier decrees made in these suits, an inquiry is actually directed, to ascertain who

1836.
MAYOR OF LYONS v. EAST INDIA COMPANY.

is the heir of General *Martin,* according to the English law, and a declaration, that in case the Will of the testator should be found not to have been executed according to the Statute of Frauds, that portion of real estates of General *Martin,* which is situate in *Calcutta,* is declared to belong to his heir-at-law, according to the English law.

It is quite clear, therefore, that neither the Supreme Court or the East India Company, or any other person interested in the question, ever thought of raising the objection of alienage at that time; but let us see to what the objection amounts. The general principle applicable to this question, is stated by Mr. Justice *Blackstone,** and the principles there stated do not merely apply to what we call civilized countries, but even to such as are in a state of semi-barbarity, inhabited, as our possessions in *America* were, by the wild Indians, which, though not inhabited countries, in the general sense, are countries nevertheless having inhabitants, and therefore having some sort of law of their own, and consequently the English laws only prevail to the extent to which they have been positively introduced.

Now we submit that the English law of alienage has never been introduced into *Calcutta.* No Act of Parliament, no charter mentions it, but I gather that there is some notion that if the English law relating to real property is found to prevail, then you are to presume that the English law prevails in all other respects, and that it is upon this assumption, that it is contended, that the law of alienage has been introduced.

The case of *Freeman* v. *Fairlie,*† decided by Lord *Lyndhurst* in 1828, for the first time determined that

* Vol. i. p. 107.

† See *post.*

1836.
MAYOR OF LYONS
v.
EAST INDIA COMPANY.

houses and lands in *Calcutta* are of the nature of freehold property, that is as between subject and subject; that is the only authority, and if relied on as establishing that the whole system of tenure, according to English law, prevails in *India,* will be found to be very far short of such a conclusion.

By the Act 21 *Geo.* III, c. 70, which was passed to explain and amend the 13 *Geo.* III, c. 63, under which the Supreme Court of *Calcutta* was erected, the laws and usages of the Mahomedans and Gentoos, are recognised and reserved,* although the laws of *England* are in many respects introduced as between Europeans and Englishmen resident at *Calcutta.* Now. assuming the law of alienage to apply to those subject to the English law, is General *Martin,* a foreigner, not resident within the jurisdiction of the Supreme Court, or even within the territories of the East India Company, to be deemed an Englishman, and made liable to the jurisdiction of the Supreme Court, for the purpose of incurring forfeiture of his estate? Such a law is too palpably unjust to prevail. We admit he might be subject to the criminal law, because he was in the service of the Company, and might be summoned within the jurisdiction of the Court, but that could not affect his personal *status,* or his civil rights. Let the Court look at the extent of injustice which the doctrine contended for would work; here is a gentleman, a foreigner by birth, but domiciled in the *East Indies,* acquiring a large fortune, and induced to invest it in the country in which he is residing; every facility is given him; he is permitted to purchase lands, to hold them when purchased, unmolested, and without any, even the most distant, supposition, that immediately on his death, the Government of the country which has thus afforded him protection and encouragement, will turn round and lay claim to his estate, on the ground that he was an alien, and could not acquire lands; it is admitted that the lands in *Calcutta* were legally conveyed to him, and the decree of the Court below involves this palpable absurdity; that the real estate in *Calcutta* is declared not to pass by Will, though the Will itself is declared to be well executed to pass real estate. What confines the law of alienage, if it prevail at all, to the district of *Calcutta* only? The tenure of the real estate at *Lucknow* and *Calcutta*, must be the same, if the laws of *England* prevail respecting the descent of real estates, which the decree declares, without distinction, to be well devised according to the Statute of Frauds.

---

* Sec. 17.

But the right of the Crown to the real estates of aliens, exists only in those colonies where the English laws have been exclusively established; and neither English tenures or the English laws of real property, have ever been, by treaty, charter, statute, or custom, established or introduced into the town of *Calcutta* or the Presidency, except as respects British subjects.

There can be no escheat until office found, there must be a record to entitle the Crown to claim : there is no process analogous to the writ of inquiry, and no Court of Exchequer into which the writ can be returned; the absence of all machinery, shows the object it is intended for does not exist.

II. As to the establishment of the College of *Constantia* House, at *Lucknow*. It appears from the Master's report of 3rd *February* 1830, that he was unable to determine whether the foundation and establishment of the College could, with reference to the sanction and disposition of the *Lucknow* Government, be carried into effect, there not being before him sufficient evidence to decide; but as no further evidence was likely to be obtained, he attaches the correspondence relating to it, between the Company's secretary and attorney, and Mr. *Ricketts,* the British Resident at *Lucknow.* To this part of the Master's report, an exception was taken, and having been allowed, a further correspondence takes place between the attorney to the Company, and the Government secretary, the result of which is, that the Governor-General intimates that he is willing to undertake the execution of the trusts of General *Martin's* Will, respecting the establishment of *Constantia* House College at *Lucknow,* and expresses his readiness to carry the same into effect.

Now the question is, whether this is sufficient to satisfy your Lordships, that this charity can be literally and actually established. The amount of the evidence is, that the King of *Oude* has no objection to the establishment of the College; that is, so far as respects the educational part of it, for he expressly objects to any foundation for the relief of prisoners. What certainty is there that he may not change his mind to-morrow? In order to enable a Court of Equity, which the Supreme Court is, to carry a charitable trust into execution, it must be satisfactorily shown to the Court, that it has the means of carrying the intention of the testator fully into effect. In the case of the Provost, Bailiffs, &c., of *Edinburgh* v. *Aubrey,** the Court of Chancery held, that they could not order the distribution of a legacy to be applied to a charity in *Edinburgh*; and there being a specific devise to the plaintiffs, Lord *Hardwicke* directed the funds to be handed over to them, as trustees, to be applied as they thought fit: here there is no bequest of the sum, to carry this charity into effect, to the executors, which would make them trustees, and enable the Court to direct the fund to be paid to them: they have accounted, and been discharged, and have nothing more to do with the funds of the testator. It is impossible to consider the Governor-General as capable of carrying the charity into effect, the establishment and continuance of the charity being entirely at the will and pleasure of the King of *Oude*. We submit, therefore, that this legacy cannot take effect; and the question then arises, what becomes of the fund?

---

* Ambler, 236.

Upon this point it is necessary to inquire what is the law of this country with respect to charitable bequests. In *Moggeridge* v. *Thackwell*,* this question is very fully discussed, upon a review of all the cases previously determined; and the result of Lord *Eldon's* judgment is, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the King, by sign manual; but that where the execution is to be by a trustee, with general or some objects pointed out, there the Court will take the administration of the trust. Now I take this as apparently being the most strong of any case against the position I am contending for. It must be observed, that previous to that case, the principle of the law was somewhat different,—*Corbyn* v. *French*,† *Attorney-General* v. *Bishop of Oxford*,‡ *Attorney-General* v. *Boultree*.§ But admitting the law as laid down by Lord *Eldon*, the question arises here, first, whether there is enough to establish a general charitable intention; and secondly, supposing there to be sufficient evidence of such inten-

---

* 7 Ves. 36. † 4 Ves. 418. ‡ 1 Bro. C. C. 444. § 2 Ves. J. 380.

1836.

MAYOR OF LYONS v. EAST INDIA COMPANY.

tion, whether, where the object of that intention is to establish a charity in a foreign country, the King by his sign manual can apply the funds, or the Lord Chancellor, as the Keeper of the King's conscience, can carry such intentions into effect. What power has the Crown or the Court of Chancery to enforce compliance with the testator's intentions ? Where there is a person to receive the fund bequeathed for a foreign charity, the Court directs it to be paid to that person, and the execution of the trust is with that party ; but where there is no hand to receive the fund, and the Court is called upon to give the intention of the testator effect, then the question is, how is the Court enabled to do so ? This is, I believe, a new question. If a trustee intervened, or if the King of *Oude* was himself willing to receive the fund, there would be no difficulty; but the question really is, how can the Supreme Court, or the Governor-General, carry this trust into effect, so as to satisfy the intentions of the testator ?

This is no case for the application of the doctrine of *cypres,* for the whole charity must fail for want of power to execute it. There is no general charitable intention to be found in this Will : by the first article, a fund is to be set apart to accumulate, the interest of which is to be applied by the executors, "as they would devise with themselves, and with the best advice they could receive;" this is not such a charitable intention as any Court can execute ; a permanent fund, the interest of which is to be applied to some charity, but as soon as the interest ceases to increase, then there is an end to the charitable application of it. With respect to the sum of 4,000 sicca rupees given to liberate prisoners, if that sum is not requisite, it is directed by the testator to accumulate. The King of *Oude* having repudiated this gift, the accumulation becomes indefinite, and though not subject to the *Thelusson Act*,* which applies only to *England*, this Court will not carry such directions into effect, but will vacate the trust and declare the fund to form part of the residue.

III. The only remaining question is, whether this is a mixed fund. In respect to this, the original decree of the Court below is insufficient, not directing an inquiry to ascertain the nature and tenure of the lands possessed by the testator, besides those situate in *Calcutta* ; the consequence is, that the Supreme Court is in entire ignorance on this subject, and yet, notwithstanding, provides to make a decree affecting all the testator's lands, and giving special directions concerning them, without reference to their nature, extent, or tenure. The same objection applies to the declaration that General *Martin*, at the time of his death, had no relations of the whole blood ; the only finding of the Master is, that certain parties are his next of kin, but that does not preclude the possibility that he has an heir ; in spite, however, of these manifest defects, and the imperfect information possessed by the Supreme Court, it has appointed its own officer receiver of the real estate, and has taken possession of all the funds directed to accumulate, and which are the subject-matter of dispute. This is a most unusual, and, I submit, irregular practice. With regard to the objection taken by the officers of the Crown, that these lands being devised to superstitious uses, are within the Statute of Mortmain, as I do not know whether that argument is to be relied on, I shall reserve all observations upon it to my reply ; presuming only, that if the Statute of Mortmain be applicable to the *East*

---

* 39 and 40 *Geo.* III, c. 98.

Indies, it must also be to *Ireland* and *Scotland,* which has never yet been held.

Mr. *Pemberton,* K.C. :

There are but two points upon which I shall trouble the Court :—1. As to the testator's character of an alien ; 2. As to the bequest to the *Lucknow* charity. The first is one of the utmost importance ; it applies not only to this property, but to a very large portion of the land in *Calcutta,* which is in the hands of aliens. It was first broached in 1826, in the Supreme Court, in an action of ejectment, *Doe* on the demise of *Pouchelette* v. *Stansbury,* executor, when the lessor of the Plaintiff, appearing, by the evidence, to be a French-born subject, was nonsuited, the objection being taken, not by the counsel or parties in the action, but by the Court itself, and nonsuit entered thereon, notwithstanding a motion was subsequently made on the part of the plaintiff, to set aside the nonsuit. This is the only instance that the records of the Supreme Court contain, wherein the rights of aliens to hold or convey real estate in *Calcutta,* has ever been impeached ; but that decision, at the most, admits the principle only as between subject and subject, and by no means decides that such a rule prevails between the subject and the Crown, which depends upon the prerogative attaching to the King, as superior lord of the fee, and not upon the tenure, or the *status* of any particular individual.

But there is, besides, this peculiar difficulty in the position now insisted on, that it is made applicable to British subjects alone. It is admitted that both Mahomedans and Gentoos may hold lands, according to their own laws, and then the law of escheat, does not attach ; but when lands are in the possession of a

Frenchman, although a British subject, they become liable to escheat, he, in fact, being, by reason of his being an alien, incapable of holding or transmitting them.

Such a proposition is upon the face of it untenable. It presumes a partial and not a general application of the law of forfeiture ; if it does not apply to Mahomedan or Gentoo aliens, why should it to French, Armenian, or Dutch? It is said that the case of *Freeman* v. *Fairlie,* affords the principle for this doctrine, and that the circumstances of lands, in *Calcutta,* being held by a *Pottah,* which is there alluded to, shows that they are of feudal tenure, and subject therefore to the superior lord, as owner of the fee : no such principle is to be discovered in the judgment of Lord *Lyndhurst* ; in that case it is expressly stated by him, that it appears upon the very face of the *Pottah,* that it is nothing more than a fiscal regulation, introduced for the purpose of collecting the tribute to which the land is subject. Sir *Henry Russell,* formerly one of the judges of the Supreme Court, whose opinion is cited by Lord *Lyndhurst*, states that it is no evidence of title, which the form of it confirms. But the case of *Freeman* v. *Fairlie* goes much further ; for in referring to what are denominated the permanent regulations relative to *Calcutta,* the noble and learned judge negatives the assumption, that the Crown ever had any feudal title to land in *India.*

It is not very clear whether the title of the Crown arises from escheat, because there is no owner of the property, or in some other way. Mr. Justice *Blackstone* says,—"aliens are incapable of taking by descent, or inheriting, for they are not allowed to have any inheritable blood in them ; rather indeed, upon a principle of rational or civil policy, than upon any reasons strictly feudal.'"* The title seems to accrue to the superior lord by escheat ; so that if the land be copyhold, it would go to the lord of the manor, and not the Crown ; and if that be so, there is an end to the question here, for the Crown does not pretend to be the feudal lord of the territories in the *East Indies.*

In *Bombay,* the land is at this day, granted to be held of the manor of *East Grinstead.* It is clear from the authorities already cited, that the natives in the *East Indies,* possessed laws of their own, respecting property, before they became subject to the Crown of *England* ; the laws of *England,* therefore, can only prevail there, to the extent to which they have been introduced, by charter or usage, and the question then is, has this law of forfeiture, as applicable to aliens, ever been so introduced? The right of aliens to possess lands, was never questioned till the year 1826. By the Mahomedan law, existing at *Calcutta* previous to its acquisition by the English, aliens domiciled in the country, were entitled to hold houses, lands, and real estate, and to sell, bequeath, and transmit the same, to their heirs or others, not being alien enemies, in like manner as personal estate ; and since the first establishment of the English at *Calcutta,* aliens of all nations have been encouraged to settle there†, and have accordingly acquired real estate, so that a large proportion of the land in *Calcutta* is at this time held by aliens, or persons deriving title through aliens. Since the establishment of the Supreme Court‡, lands so held have been recognized and dealt with by the Court ; in 1815,

---

* Bla. Com., vol. ii, p. 249.

† See Charter, 24th *Sept.,* 13 Geo. I.

‡ *March* 26th, 1774, 14 *Geo.* III.

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

the Court admitted the Will of *Gabriel Vrignon,* an alien born, and a subject of the king of *France,* and in the Will so declared, to probate, and permitted possession to be taken of the lands and houses in *Calcutta,* thereby bequeathed by the devisees and legatees. In *Emin* v. *Emin,* in 1816, the Court assigned dower to the widow of an Armenian. These are instances from the records of the Court.

By the charter, 8th *June* 1753, granting a corporation composed of a mayor, and nine aldermen, to *Madras, Bombay,* and *Fort William,* in *Calcutta,* it is provided, that of the nine aldermen, seven at least, shall be natural-born subjects ; the remaining two may be foreign Protestants, the subjects of any other prince or State in amity with the king.

Now the king cannot grant letters of denization, except by letters patent ; and without letters of denization or naturalization, an alien cannot, in this country, hold lands ; nor can the Crown grant a license to an alien to hold an office of trust ; and yet, in the charter of 1753, not only are aliens entitled to form part of the corporation, but by a subsequent clause, the President, or any three of them, two of whom may be aliens, are empowered to hold Quarter Sessions, and to try all offences except high treason ; so that an alien, who it is said cannot hold lands, or execute a trust, is by this charter, expressly invested with the highest functions of justice—that of administering the criminal law of the country.

II. With regard to the validity of the bequest to *Lucknow* College, the question is, here is a bequest for a specific charity, can that charity be established? That the gift is specific, no doubt can be entertained ;

the particularity with which the testator directs the foundation and endowment of *Constantia* House, leaves no room to contend that he has evidenced a general charitable intention. Then, can this specific bequest be executed? The Master, by his report, assumes it cannot; that report is confirmed, and is therefore conclusive ; but the Court takes upon itself at the hearing, to direct a new reference for further inquiry and information, and impounds the fund, appointing its own officer, the Accountant-General, receiver. The Master subsequently finds, that though the Supreme Court cannot give effect to the testator's intention, yet that the Governor in Council can; how, he does not say ; but upon that finding, the Court proposes to pay the whole fund over to the Governor-General, to be applied by him as he may think proper ; for the moment the Court parts with the fund, all control over it is gone.

Now to what does this proceeding amount, but to a confirmation of the Master's original opinion, that the Court cannot carry the bequest into effect? And what right have the Court to deal with the fund, if they cannot carry the bequest into effect ; or if they cannot apply it as the testator directs? Then, not being capable of being applied to the specific object, is it to go as *cypres*? The principle of the doctrine of *cypres,* has been already fully argued ; it is not capable of being applied where the bequest is specific, and cannot therefore operate here. The consequence therefore is, that it must fall into the residue, and be divided between the Mayor of *Lyons* and the next of kin, according to the arrangement entered into between them.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the East India Company.

Mr. Serjeant *Spankie* :

We appear here, not as original parties to the suits, in the Court below, but as representing the East India Company, who, in consequence of the decision of that Court, claim an interest in the property in question, and by the arrangement already alluded to, have been made respondents upon this appeal. The question now submitted to the Court, is one of infinite importance, not in consequence of the value of the lands, for they are of comparatively small account, but as affecting a very large portion of the territories in the *East Indies.* The population of *Calcutta* is the most mixed of any in the world ; Portuguese, French, Armenians, besides natives, most of whom would be aliens, under the laws of *England,* and yet have been accustomed to transfer lands, the title to which has now become insecure, by reason of the new decisions of the Supreme Court. It is admitted, on all hands, that if the English law of alienage applies to lands in the *East Indies,* it must operate in this case ; the only question therefore is, whether that law has been introduced. The principles which govern the establishment of English law in our colonies, are to be found in Lord *Mansfield's* judgment, in *Campbell* v. *Hall,** and in *Chalmer's* opinions,† and the whole question must turn upon how much of the English law has been introduced into *Calcutta* ; and this must depend upon the force and effect of the charters, which have at various times been given to the East India Company, and which it will be necessary briefly to examine.

---

* 1 Cowp. 204. Loft. 655.

† Vol. i, 244.

It is perfectly well known that *Calcutta* was obtained by the East India Company, by purchase from the proprietors, who were the *zemindars* ; and by an indenture dated 22nd *July* 1702, the old Company conveyed to the new Company, amongst other possessions, *Fort William,* in *Bengal,* and the factories of *Chutternuttee,* with a large territory thereto belonging : which conveyance was recognized and confirmed by the award of Lord *Godolphin,* 29th *September* 1708. In 1726 the first charter for incorporating the mayor and aldermen at *Madras-patnam, Bombay,* and *Calcutta,* and for erecting a Mayor's Court, and other Courts, at each of those settlements, was granted by King *George* II. In that charter it is recited,—"that the United Company have, by strict and equitable distribution of justice, within the towns, forts, factories, and places belonging to the said Company, in the *East Indies* and other parts, very much encouraged, not only our own subjects, but likewise the subjects of other princes, and the natives of the adjacent countries, to resort to and settle in the said towns, forts, factories, and places, for the better and more convenient carrying on of trade ;" and it then proceeds to establish a Court of *Oyer* or *Terminer* and provides, among other things, that the juries there assembled should consist of the principal inhabitants of the place, without saying anything of their being the king's subjects,—an omission which is found also in the subsequent charter of 1753, and which is an important fact, when we are considering how much of the English law has been introduced into that country. In consequence of the dispersion of the mayor and aldermen, and the dissolution of their authority by the occupation of *Madras* by the French, previous to the treaty of *Aix-la-Chapelle,* a new charter was granted in 1753, re-erecting the body corporate, by the name of "The Mayor and Aldermen of *Madras-patnam*," which was to consist of a mayor and nine aldermen, of whom seven at least, together with the mayor for the time being, should be natural-born subjects, and the remaining two might be foreign Protestants, the subjects of any other prince or State in amity with the King. It then constitutes a Court of *Oyer* and *Terminer* and Gaol Delivery, composed of the mayor and any two of the aldermen, and provides that the jury, should consist of the principal inhabitants of the district, and should take the same oaths as are administered in *England* : and the Civil Court is empowered to try all cases except suits between Indian natives of *Madras*, which are to be determined by themselves, according to their own law, unless they should choose to submit to the judgment of the Court.

Besides the authority conferred by the charter, the Company were, by treaty with the Nabob, *Sereja Dowla*, A.D. 1757, empowered to erect a mint, and coin money in *Calcutta* ; and in the same year, they acquired a *perwannah* for the twenty-four *pergunnahs*, which is a district immediately adjoining *Calcutta* ; so that, at that time, instead of *Calcutta* being part of the territories of the king of *England*, it was held under a native prince, by a company of merchants, paying a tribute in the shape of a sort of a quit-rent. At the period we are now speaking of, the European population was inconsiderable, neither fixed or permanent, but constantly changing, and consisted rather of travelling merchants, and persons within their employ, than of any fixed or stationary body. Had the laws of English tenure then prevailed, it would have been impossible to carry them into effect, as it is probable that in case of intestacy, no such person as the heir-at-law would have been to be found in the country; but in truth, as far as the law of tenure existed, the Mahomedan must have prevailed.

The natural course is to consider the law of real property according to the *lex loci* in the *East Indies*; that then would be the Mahomedan law: and the introduction of the English law would not be to the same extent as in a country conquered, as *Jamaica,* or ceded, where the law of the mother-country becomes, *ex concessu,* the law of the colony. In such case, the law previously existing is *tabula rasa,* and the new law prevails to its full extent. The prevalence of such a law in *India,* has never been heard of till the recent decision in the Supreme Court of *Calcutta.* At *Madras* it has not even yet been introduced, all real property being held there to be chattels only, and passed and transferred by instruments used for the conveyance of chattels.

But having briefly examined the nature of the general charters, we come now to that of 1774, for erecting a Supreme Court of Judicature at *Fort William*: and this will require particular notice. By the 13 *Geo.* III, c. 63, s. 13, His Majesty was empowered by charter, or letters patent, to establish a Supreme Court at *Fort William,* and the words of that section show the particular caution with which it was intended this introduction of the English law into *Calcutta* should apply. The section first alludes to the charter of 1753, granted by *George* II, which it states—"does not sufficiently provide for the due administration of justice in such manner as the state and condition of the Company's Presidency of *Fort William* in *Bengal,* so long *as the said*

*Company shall continue in the possession of the territorial acquisitions before mentioned,*do and must require:" and it then proceeds to empower the king to erect the Supreme Court at *Fort William,* which is declared to have "full power and authority to exercise and perform all civil, criminal, admiralty, and ecclesiastical jurisdiction;" and "to form and establish such rules of practice, and such rules for the process of the said Court, and to do all such other things as shall be found necessary for the administration of justice, and the due execution of all or any of the powers, which, by the said charter, shall or may be granted and committed to the said Court;" and declares such Court to be a Court of Record, of *Oyer* and *Terminer* and Gaol Delivery. Now this is not an abosolute introduction of the English law, but only *sub modo,* that is, *as long as the company shall continue in possession of the territories* there enumerated, and the Company is at the same time made the medium for the introduction of such parts of the English law, as is capable of being applied to the *East Indies.* That it was a qualified introduction is plain, from the circumstance, that up to this moment the trial by jury does not exist except in criminal cases. How then can it be argued that the feudal law of tenure, with all its various incidents and circumstances, which never can exist in that country, has been introduced? In a subsequent statute, 21 *Geo.* III, c. 70, passed to explain the 13 *Geo.* III, it is, by the 17th section, provided, that the Supreme Court shall determine all actions and suits against the inhabitants of *Calcutta,* in the case of Mahomedans and Gentoos, by their own laws and usages, reserving to that class which constituted the largest portion of the inhabitants of *Calcutta,* their own peculiar laws and customs: by the 23rd section of the same Act, the Governor-General and Council are empowered to frame regulations for the Provincial Courts and Councils, which form a code of laws for the regulation of the whole system of jurisprudence to be administered within the jurisdiction of the Supreme Court. By the 3rd section of the 38th Regulation of 1793, made in pursuance of this Act, provision is made for allowing aliens to purchase and hold lands, subject to the sanction of the Governor-General and Council: this regulation expressly recognizes the previous regulation of 8th *June* 1787, which was for the same purpose, and the effect of which has been, that almost all the land in the *Mofussil,* has been held by foreigners. Let us see, however, to what extent the laws of *England,* as regards real property, have been introduced into *Calcutta.* In *Gardner* v. *Fell,*[*] it was held, for the first time in this country, that in order to pass lands, held in *Calcutta,* by Will, the Will must be executed according to the Statute of Frauds. The Master of the Rolls, in his Judgment, alludes to the case of *Freeman* v. *Fairlie,* which was then pending, and in which a commission had been issued to ascertain the rules of descent which prevailed in *Bengal.* That case has been since decided, and I understand it only affirms the principle before established, by decreeing that lands in *Calcutta,* being of the nature of freehold, descend to the heir. It does not decide them to be freehold, but only of the nature of freehold; that is, so far as respects the right of the heir-at-law to succeed to them. The adoption of our form of conveyance by lease and release is no evidence of the tenure of property there; for it has been introduced entirely to prevent forgery, and without relation to that assurance. By the charter of 1774, all lands in *Calcutta* are liable to be sequestered, and, after judgment, may be held for the payment of the debts, and such is the common course; and it has been held that as the lands are liable to debts in the possession of a testator, under the provision giving the Supreme Court ecclesiastical jurisdiction, they are also liable, in the hands of the executor. Now the greater portion of the lands in *Calcutta* are derived through, or immediately from, an executor, and consequently that construction of the charter becomes of great importance and constant application, and was not interrupted until the 9 *Geo.* IV, c. 33, which enacts that whenever any British subjects, or persons not being Mahomedans or Gentoos, shall die entitled to any real estate in *India*, such estate shall be deemed assets for the payment of debts ; and the expression seems to recognize other than British subjects, and would include therefore French or Portuguese, whose lands are thus made liable for the payment of debts, as before held under the charter of 1774, and the lands treated as chattels, upon which execution is to be levied, as upon an ordinary judgment. So much only therefore of the English law as relates to chattels is introduced by this statute. We insist then, that there is no English law in *Calcutta*, constituting that species of real property, upon which the prerogative of the Crown could attach, and which would make it unlawful for an alien to hold it.

---

[*] 1 Jacob & Walk. 22. *post.*

Having already shown, that under the regulations, an alien may hold lands, it must be presumed that General *Martin*, an officer in the Company's service, held those lands of which he was possessed in the

Mofussil, with the sanction and permission of the Governor-General and Council, and consequently those lands cannot be liable to escheat to the Crown.

The Will being properly executed, to pass real estate, the heir-at-law is wholly disinherited, and cannot claim any part of the lands, either in the *Mofussil,* or territories of the King of *Oude,* and the whole must be applied for the purposes, and according to the direction, of the Will.

With respect to the presumed error in the decree, the highest point to which it can be carried, is, that the Court, through inadvertance, confirmed the Master's report of 1830, which it afterwards opened, without, as it is insisted on the other side, directing a re-hearing; but the hearing on further directions was a re-hearing for this purpose, and the Court, having reserved further directions, was quite competent to make them, by sending the case back to the Master.

There is no difficulty in carrying the testator's intentions respecting the College at *Lucknow* into effect. The Master so finds, and it is apparent on the face of the case: the directions in the Will are sufficiently precise and intelligible to prevent any doubt, and the doctrine of *cypres* has no application. I shall, however, leave these subjects to be discussed by my learned friend who is to follow me, and conclude by submitting that there is no case in which the prerogative of the Crown can attach; but that if the law of alienage shall be held to prevail in the *East Indies,* and to be applicable here, the East India Company, as exercising the supreme authority, and enjoying, under the grants and charters, the exclusive interest in the territories, is entitled to administer the charities with-

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

out infringing on the king's prerogative, and that they ought to be so empowered.

Mr. *E. J. Lloyd* :

The principles governing the escheat to the Crown, of lands held by aliens, cannot apply in this case. The history of the establishment of British dominion in the East, and the origin and rise of the Company's power, clearly shows that only so much of the English law, as was necessary for the protection of the English settled at *Calcutta*, has been introduced. Accordingly, from the period of the establishment of the Supreme Court in 1765, down to the year 1826, no such claim, as that now set up on behalf of the Crown, to lands held by an alien, has ever been made ; on the contrary, that Court has, by repeated and successive dealings with lands so held, recognized and acquiesced in such possessions, and has thus given a sanction, equal to the weight of judicial decision, to the legality of the title of aliens.

The right of aliens to hold lands, is a question not of tenure, but of sovereignty, depending wholly upon the personal allegiance due to the sovereign, which, unlike territorial allegiance, can never be modified or diminished, but must always continue the same : it becomes, therefore, necessary to inquire whether the sovereignty of the Crown of *England,* in the *East Indies,* is such as to draw with it all the consequence of personal, as well as territorial allegiance, or whether it is not from the peculiar circumstances, under which it is placed, subject to many modifications.

I. The history of the successive acquisitions of the territories in the *East Indies,* shows that the allegiance due to the Crown of *England,* must be of a modified and restricted nature. The grant to the Company in 1699, of the three towns of *Chinsurch*, *Chandernagore*, and *Chutternuttee* (now *Calcutta*), was as proprietors, not as sovereigns. So the right of coining given in 1757, was in the name of the Emperor of *Mogul,* a deputed authority, not a delegated prerogative, for the coinage is to this day issued in his name. In the same year the Company acquired the twenty-four *pergunnahs* as *zemindars,* that is, subordinate chiefs, not absolute sovereigns; and in 1753, they obtained the grant, which is the foundation of all the sovereign rights they exercise to this day. Now this grant can never be considered as passing an independent sovereignty, for it was derived from, and is at this day, to a certain degree, subordinate to the Great *Mogul,* and can carry with it no rights to the Crown of *England,* but such as were previously possessed by the *Mogul,* and are contained in the grant itself. It is not pretended that the right of escheat was ever possessed by the *Mogul,* and therefore such a right could not pass by the grant; and not being in the grant, nor existing previously in the country, how can it be said to attach on the land when possessed by the Crown, who is, as already shown, but the subordinate, and not the absolute, lord of the fee. The Act of the 9 *Geo.* IV, cap. 33, clearly takes this view, for it speaks of others than British subjects, and makes real estates in the hands of an executor, assets for the payment of simple contract debts.

II. If the bequests in the Will of General *Martin* are general, and not particular, they admit the application of the doctrine of *cypres.* The *Attorney-General* v. *Bishop of Oxford,* does not apply, for there was no general intention indicated by the testator in that case, and the particular one could not be carried into effect.

But we contend that the particular object in this case is capable of being affected, and if that be not, yet there is sufficient general intention manifested in the Will, to warrant the Court applying the doctrine of *cypres*. The argument on the part of the appellants is, that as the Master has found that at the period of the testator's death, it was impossible to execute the charitable bequests, therefore there is such a failure as to prevent the application of the doctrine of *cypres*. But it appears from the first article of the testator's Will, that he contemplated many objects with reference to the establishment of *Constantia* House, and that would constitute a sufficient general purpose of charity to bring the bequests within the rule. Assuming, therefore, that to be the case, the Court would have no difficulty, if the charity of *Constantia* House failed, in applying the funds to other charitable purposes—*Attorney-General* v. *Ironmonger's Company*,* which was decided on the authority of the *Attorney-General* v. *The Bishop of Llandaff*. In both these cases, certain sums were given for the redemption of British captives in *Barbary*; and that object having failed, the Court held, notwithstanding, that the fund had received the impress of charity, and decreed the funds to augment other charities named in the Wills ; that is a sufficient authority for applying the liberated fund given by General *Martin* to establish *Constantia* House, in augmentation of the other institutions directed to be established at *Calcutta* and *Lyons*.

With respect to the manner in which the Supreme Court has dealt with this case on the re-hearing, it is objected, that the Court had no power to make the reference to the Master, after his previous report had

---

* 2 Myl. & Keen, 576.

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

been confirmed. This is not inconsistent with the practice of the Court of Chancery here—*Turner* v. *Turner*.* It is always open to the Court, on the hearing, if it is not satisfied with the Master's report, to direct a further inquiry, even though the report has been confirmed ; and where such report is plainly contrary to the evidence, the Court would be bound to take such a course ; and that which it could do on a hearing, it is equally competent to do on a re-hearing.

By the decree of the 7th *May* 1831, the Supreme Court declared its own inability to carry the *Lucknow* charity into effect, that is, upon the Master's finding, which was confirmed; but the Master not having found that the Government was unable to carry the charity into effect, the Court, on the re-hearing, directs that inquiry, and, upon the further report of the Master, declared the charity capable of being executed by the Government, that is, not inconsistent with the practice prevailing here.

But if the Master's first report is to be held conclusive, the funds must remain in Court, to abide the possibility of the *Lucknow* charity being established, and cannot fall into the residue, as contended for by the appellants—*Attorney-General* v. *Bishop of Chester*.† The charity cannot fail for want of a trustee : the Court will supply that. With respect to the residue, if the testator has impressed the whole of his estate generally with a charitable object, the residue must follow the same course, and the direction for accumulation in the latter clause of his Will, must be referred for its objects to the former part, where he expresses his intention of establishing many charities in connexion with *Constantia* House.

---

* 1 Swan. 155. See authorities, *ib.*

† 1 Bro. C. C. 444.

The Attorney-General (Sir *John Campbell*), and the Solicitor-General (Sir *Robert Monsey Rolfe*), for the Crown.

The Attorney-General :

The only question we feel it necessary to argue on behalf of the Crown, is that which is placed first, on the case submitted by our predecessors in office, respecting the effect of the testator, General *Martin,* being an alien, and incapable of holding lands; and the proposition which I shall submit to the Court on behalf of His Majesty, is, that the sovereignty of the territories held by the East India Company, is in the Crown of *England,* and that by virtue of that sovereignty, upon the death of General *Martin,* the real property of which he was possessed, escheated to the Crown.

The importance of this question, though overrated as far as respects this individual case, is considerable ; for though the Crown would, in case your Lordships shall affirm my proposition, be in all probability advised to grant these estates for the carrying into effect the general intentions of the Will, so far as such intentions are capable of being performed, yet in as much as very large possessions are held in *India* by aliens, it will be necessary, should the decision of the Supreme Court be upheld, to make some immediate legislative provision, against the inconvenience which would otherwise ensue.

Now we submit, that though the Crown could not have taken possession of General *Martin's* estates, he being an alien, during his life, without office found, yet that on his death they revert absolutely to the Crown, and cannot descend to his heir.

The regulations of 1793, already alluded to, show that the Governor-General in Council has the power of permitting or prohibiting, any European holding lands within the limits of the town of *Calcutta*.

The regulations are made under the powers conferred by Act of Parliament, and are in fact equivalent to Orders in Council here; the effect therefore of this prohibition to Europeans to hold lands without the licence of the Governor-General, would make such licence, in the case of an alien, equivalent to letters of denization here ; and, therefore, unless General *Martin* had obtained such, he could not legally hold lands in *Calcutta*.

I. The law disabling aliens from holding real estates, was necessarily introduced, *eo instanti,* the sovereignty of these territories became vested in the Crown. At that period the natives and inhabitants became subjects of *Great Britain,* and the lands therefore in their hands did not become liable to escheat.

To ascertain the power of the Crown, we must look, not to the history of the Company, as an association of merchants or traders, incorporated for the purpose of trade ; but to the legislative enactments and declarations respecting the rights of the Crown. That the sovereignty of the territories in the *East Indies* belonging to the Company, is in the Crown, admits of no doubt : the 53 *Geo.* III, c. 155, recites that the privileges conferred on the East India Company, should be without prejudice to the undoubted sovereignty of the Crown of the United Kingdom; and, in the 95th section, it is provided that nothing in the act contained, shall extend or be construed to extend to prejudice or affect the undoubted sovereignty of the Crown of the United Kingdom, &c., in and over the said territorial acquisitions. Now it cannot be disputed that these

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

territorial acquisitions were originally obtained by conquest, and it must therefore be taken that since the 13 *Geo.* III, c. 63, A. D. 1793, the Crown has held this territory in full sovereignty.

Admitting the general position, that upon the conquest of a colony, the law remains unchanged until the will of the conquerors is expressed, I apprehend that must be taken as between subject and subject, not as between the sovereign and the subject, and that consequently, be the government of the conquered colony what it may, the prerogative law is necessarily introduced to an extent sufficient to establish, and preserve allegiance between the conqueror and the conquered ; of this nature is the law respecting aliens, which is not a feudal law, as contended on behalf of the appellants, but depending upon a principle of national or civil policy,* which, while it allows aliens to have property in all that is moveable, prohibits them holding lands, because they owe an allegiance, not to the Crown of *England,* but to a foreign power. The law of alienage has been established, therefore, for the purpose of preserving the allegiance from the subjects to the Crown, and not upon the feudal system, as a tenure of land.

In the introduction of this law into a conquered colony, the same rules must apply to the *East Indies* as to any other colony, as, for instance, in *America,* and there it is admitted that aliens cannot hold lands.† That was the opinion of Sir *Fletcher Norton,* in 1764. Then why in *India* if not in *Pennsylvania?*

II. The law of real property prevailing in *England,* has been introduced into the *East Indies,* and the law of alienage, being incident to, and parcel of, that law,

---

[*] 1 Bla. Com. 372.

[†] 2 Chal. Coll. of Opinions, 364.

1836.

MAYOR OF LYONS v. EAST INDIA COMPANY.

has been established with it. At the period of the acquisition of the territories in the *East Indies,* there was no law applicable to European settlers. The Gentoo law was for one set of natives, the Mussulman law for another, but there was no law to which Christians could conform ; for which reason the original settlers mut necessarily have carried the laws of *England* with them.*

That the European settlers have so felt and acted, is evident, from their having adopted our forms of conveyance by lease and release, availing themselves of the Statute of Uses ; and the Courts holding three witnesses to the devise of lands necessary, have in the same way, introduced the Statute of Frauds.

But it is not merely by the acts of the European residents themselves, or the decisions of the Supreme Courts, that the English law has been introduced : the charters granted under Acts of Parliament from 1773 downwards, all establish the same fact : by them, courts of justice are established, having jurisdiction over all persons, without discrimination, within certain limits, founded on the same principles and administrating the same laws as prevail in the king's court here. Can it be said, that is not an introduction of English law? The application of the law of this country to the *East Indies* has been recognized and enforced in our own country—*Gardner* v. *Fell, Freeman* v. *Fairlie.* If, therefore, the law of real property, as prevailing here, is introduced into *India,* as these authorities establish, the heir, to take property, must be, according to the rule of law, here ; he must be born in *jure matrimonia,* the nearest male descendant of the whole blood : that would exclude the party claiming as heir-at-law to

---

* 1 Chal. Op. 194, 195.

General *Martin,* if he died intestate, for the testator's brother, *Louis Martin,* was only of the half-blood. But General *Martin* could have no heir, for, not having received letters of denization, he had no heritable blood in him ; he was not a natural-born subject, and therefore the land is escheated to the Crown, that is, independent of the law of alienage.

With respect to the objections urged on the other side : first, with regard to allowing Armenians to hold lands ; that was in pursuance of an agreement made between the Government and company of merchants trading to the *East Indies,* of 22nd *June* 1638, whereby it was agreed that Armenian merchants should have liberty to settle in any of the Company's cities, garrisons, or towns ; and to buy, sell, and purchase lands and houses. Now, independent of this agreement, if the East India Company intended to abrogate the prerogative of the Crown, it could have no legal effect, for it was made in 1688, when they were mere settlers and merchants, and had nothing like a sovereign power or authority.

Then with respect to the charter constituting the corporation, to be composed of a certain number of aldermen, all of whom need not be British subjects, no real property qualification is required : that might have given ground for argument ; but as it is, it is only a municipal and fiscal regulation. It was said also, that there was an impossibility of granting letters of denization : but how is that proved? I contend, that so far from such being the case, the statute 9 *Geo.* IV, c. 33, has expressly pointed at such ; when it permits British subjects and " others " to purchase and hold lands in *Calcutta,* such others must be those who can

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

legally hold them, and they, if aliens, can only in strictness be such as have acquired letters of denization.

Upon the authorities therefore in this country, as well as in *India,* I contend that the Crown is entitled to the lands possessed by General *Martin* at his decease, and that this Court will not be guided by any fancied inconvenience from establishing and giving effect to a great constitutional principle.

The Solicitor-General :

The authorities already stated, as well as the charter giving jurisdiction to the Courts to hold pleas, real, personal, and mixed, all conspire to prove that the law of real property, as established in this country, prevails in *India,* and to confirm the decision of Lord *Lyndhurst,* in *Freeman* v. *Fairlie ;* and if such be the fact, the impracticability of aliens holding lands, being a parcel of that law, must prevail in the *East Indies* also. This is not a rule of tenure, but a consequence of the royal prerogative, founded upon principles of State policy.* The case in *Dyer,*† (where it is said that an alien cannot purchase copyhold lands, because he hath no power to retain them, unless wholly for the king, and the king cannot hold of any one, and therefore, if he purchase, it must escheat to the lord,) is relied upon, as opposed to the doctrine of Lord *Coke ;* but that case is not good law ; it is questioned whenever cited. If an alien purchase land, it escheats to the Crown notwithstanding, and that, even though it be copyhold—*Holland's* case.‡

---

* Co. Lit. 26. *Calvin's* case, 7 Rep. 26.

† 2 B. 144.

‡ Style's Reports, p. 20.

The grounds upon which this law respecting aliens rests, are stated in *Holland's* case, by Lord *Hale,* thus : —"The reason why an alien may not purchase lands is, because that the kingdom might not be impoverished thereby, by transporting the revenues of the land into a foreign country, and putting a part of it, under the subjection of a foreign prince ; it is, therefore, a reason of State policy, applicable as well to the territories of the Crown, within its own dominions, as those situated in our countries, and which have by conquest or treaty, become part of its possessions." The statute 32 *Hen.* VIII, c. 16, s. 13, concerning strangers, enacts "that no strangers, except denizens, may take any lease of any dwelling-house or shop, within the realm, or in any other, the king's dominions, part of the possessions of this country."

At that time, *Calais,* and the northern isles, *Guernsey* and *Jersey,* were part of the possessions of this country ; could it be contended that that act did not apply to them, as well as the British Isles?

The opinion of Sir *Fletcher Norton,* already cited, shows that the law is equally applicable to all colonial possessions of the Crown ; the Acts of Parliament to which he refers, the 13 *Geo.* II, c. 7, and 2 *Geo.* III, c. 25, were passed with a view of encouraging foreigners in *America,* but they, in no respect, alter the disqualification of aliens to hold lands, without letters of denization, or some equivalent.

The 13 *Geo.* III, c. 14, entitled, "An act to encourage the subjects of foreign States to lend money upon the security of freehold or household estates, in any of His Majesty's colonies, in the *West Indies,* and to render those securities, granted to such aliens, effectual for recovering payment of the money so to be lent, by sale of such freehold or household estates;" was passed in consequence of the alarm prevailing after the war of 1763, that we had not capital sufficient to manage the transactions in our colonies. It recites that doubts had arisen whether, as the law then stood, any security, in the nature of a mortgage, granted to a foreigner or alien, or to any person in trust for him, could be made effectual against such estate, for recovering the money lent thereon ; and that no foreigner or alien, as the law then stood, could bring or prosecute any suit for the recovery of money, in any court of law or equity within His Majesty's dominions, at a time when the State of which such alien is a natural-born subject, is at war with this kingdom ; and then, in order to remove such doubts, and to encourage foreigners to lend money on the security of estates so situated, it is enacted, by the 2nd section—"That in case of non-payment of money so lent, suits may be brought at common law, for the recovery of damages, or in the Court of Chancery for the colony, and the plaintiff shall be entitled to a like remedy for recovery as a British subject;" and by the 3rd section, power is given to the Court of Chancery, to order sale of the mortgaged premises, as in cases where the mortgagor had consented to a sale.

Now the provisions of this statute are, not that an alien is to take possession of the land so mortgaged, but that the Court shall take care that it is sold, and there is no authority to be found, more distinctly recognizing the doctrine respecting the inability of aliens to hold lands in our colonies, than in the enactments of this statute ; and looking at the state of the law, anterior to the passing of this act, recognized and recited by the act, it is quite clear that the legislature intended to leave this doctrine unimpeached, and by the declaratory part of the act, have, in fact, strengthened and confirmed it.

The cap. 25, of the same year, which was passed to explain the two former acts of the 13 *Geo.* II, c. 7, and 2 *Geo.* III, c. 25, has in no way varied the effect of the previous act.

With regard to the objections urged by the appellants, that there is no machinery by which this law can be carried into effect, that would apply equally to many of our colonies, for, except the Supreme Court, there is no other Court of Exchequer ; but that is not a ground of objection which is tenable ; it cannot be a bar to the prerogative of the Crown, which will, if it think fit, readily create means to enforce its claims, if those means do not at present exist ; then, as respects the obtaining letters of denization, it is said by the appellant's counsel, that no such letters have ever been required for aliens resident in *India,* and that there is no mode of obtaining such : that again, is a fallacy; letters obtained from the Home Office here, would be just as good for the purpose of holding lands in *India,* or in one of the colonies, as in this country itself ; there is no such thing as partial letters of denization ; they are in their very nature general, and must extend to all the dominions of the Crown.

It is not fairly put, when it is said that the enforcing this rule of the law now, is a breach of faith ; the abstaining from such a claim on the part of the Crown, may have been accidental, and probably arose, from there being no Crown law-officer in the Presidencies, the Advocate-General being the officer of the Company, not of the Crown ; but the absence of asserting the prerogative, is no bar to it, when it comes in question, and those who, like General *Martin,* being aliens, have purchased lands under such disabilities, must abide the consequence of their own acts ; it is an evil, which, if found to press hard, the legislature can remedy without difficulty.

In the case of *Gabriel Vrignon,* cited from the records of the Supreme Court, it cannot be contended that, because no claim was made on the part of the Crown, or no notice taken by the Supreme Court, the prerogative of the Crown is barred, when it comes, in another case, to be asserted ; the case, however, proves too much, for the peace with *France* was only in 1815 ; he must have been, at the time of making his Will, an alien enemy, and it cannot be contended that an alien enemy could have any legal title in lands ; the same rule applies to General *Martin ;* he died in 1800 ; either it must be presumed that he obtained letters of denization, or he was an alien enemy, and as such, incapable of holding lands. The act of 9 *Geo.* IV, c. 33, known as Mr. *Fergusson's* act, has been fully commented on by the Attorney-General ; I entirely agree in his observations ; but I rely especially upon the 13 *Geo.* III, c. 14, conceiving that no sound distinction can be made between the colonies of the Crown in the *West India* isles, and its possessions in the territory of *Asia ;* and I submit, with great confidence, that the lands of General *Martin,* situate in *Calcutta,* or within the Presidencies of *Fort William,* or the provinces subject thereto, are forfeited, and must be declared to have escheated to the Crown.

Mr. *Tinney* (in reply) :

The inconvenience of applying the laws respecting aliens to the *East Indies,* is admitted on all hands, but the law-officers of the Crown say it can be remedied, by the Crown granting the funds, in this particular case, to the objects contemplated by General *Martin* in his Will, and preventing, by legislative enactment, a similar inconvenience occurring again ; and they hold out a reasonable expectation, that that course will be adopted here, if your Lordships shall, in this respect, affirm the decision of the Court below.

However satisfactory to the parties such a promise may be, it is better to have the limits of this branch of law well defined, for it is impossible to say, in what cases it may not be made applicable, if allowed here ; it is admitted that the rule cannot extend beyond the lands in *Calcutta,* and the *Mofussil ;* the lands, therefore, in *Lucknow,* are not affected by it.

No authority of any kind has been produced, to show that the escheat to the Crown, in the case of alienage, is any other than a rule of municipal law ; if it were otherwise, it would prevail in other countries than *England ;* in the *Canadas* therefore, it might be expected, but there, the old French law, the *Droit d'Aubaine,* which repudiates our law of alienage, prevails, and though at his death, the lands of an alien go to the Crown, yet he can hold them during his life. The authorities referred to by *Blackstone,* vol. i, 372, confirm this view, and show that by the civil law, no such prerogative as that contended for, existed. By the Mahomedan law, aliens may hold lands. The escheat of a copyhold, in the possession of an alien, cannot be ; it is contrary to the case in *Styles,* where a beneficial interest in copyholds was seized under inquisition, and the judgment was *removeas manus ;* the Judges said that, in as much as it was a mere beneficial interest, the legal estate could not go to the Crown, and from that time to this, there has been no decision touching the point of copyhold.

The argument on behalf of the Crown, assumes, that if any part of the law of real property is introduced, the law respecting aliens must necessarily follow; that is not a sound conclusion, nor is it warranted by the authorities cited;* it must appear itself to have been introduced, being not a rule of tenure, but a municipal regulation.

The charters of *Geo.* I and II, recite that foreigners have settled within the territories belonging to the Company; that can mean nothing else than that they have become residents, and if so, purchasers and owners of houses and lands; the charter under 13 *Geo.* III, c. 63, is, in fact, the first introduction of English law into the *East Indies*; but it is chiefly for the purpose of establishing courts of justice, that that charter was granted, and nothing is said in it respecting the special introduction of any particular branch of the laws of this country. It provides, moreover, that such courts shall exist, only so long as the Company shall continue in possession of their territorial acquisitions. By the 38th regulation of 1793, sec. 3, it is provided, "that no European, of whatever nation or description, shall purchase real, or occupy directly, or indirectly, any land out of the limits of the town of *Calcutta,* without the sanction of the Governor-General in Council." Now, if an alien could not hold lands before this regulation, what necessity was there for it?

The act of the 9 *Geo.* IV, c. 33, which is known as Mr. *Fergusson's* Act, and which makes real property in the possession of Europeans and others, not being Mahomedans or Gentoos, assets for the payment of simple contract debts, affords the strongest argument in favour of the appellants; for the strained construction which has been attempted to be given to the word " others," as meaning other European aliens, who have acquired letters of denization, and for which the counsel for the Crown are indebted to the suggestion of the Court, can never be supported ; according to the English law of alienage, an alien cannot die seised or entitled, but the words of the act are—" shall die seised or entitled ;" there is nothing in the act to distinguish any of the various denominations of residents in *India,* not being Europeans, Mahomedans, or Gentoos, all of whom are included under the word " others,"—Parsee, Armenians, Bermese, Frenchmen, Chinese, &c.

---

* 1 Bla. Com., 108.

With respect to the act of *Henry* VIII, cited by the Solicitor-General, that is strongly in my favour, for the words there used are, " within this realm, or any other of the king's dominions." Now this is a legislative recognition that the colonies are not part of the kingdom, but are other dominions, and *Blackstone* says, respecting those territories which belong to the Crown, but which are no part of the kingdom,—" the common law of *England* has no allowance ; they being no part of the mother country, but distinct, though dependent, dominions ;"* the law of alienage, therefore, could not prevail in them at the time of passing the act. The statutes 13 *Geo.* II, c. 7, and 2 *Geo.* III, c. 14 and 25, only prove that doubts existed with regard to the law of alienage in our American colonies, and were passed to encourage foreigners to make loans, by providing special and extraordinary means for their security. The Solicitor-General's argument, that these

---

* Vol. i. 108.

1836.

MAYOR OF LYONS v. EAST INDIA COMPANY.

acts, either directly or indirectly, prove that aliens could not hold lands in our colonies, is not supported by the extraordinary remedies there given. The argument of the Attorney-General is, that aliens cannot hold lands in *India,* because they have no inheritable blood ; they cannot therefore transmit them : but that is no ground of objection ; a bastard, in this country, has no inheritable blood, yet no one doubts but that if seised in fee, he can transmit his estate by Will. In what respect does the condition of General *Martin,* an alien by birth, but admitted and declared by the decree of the Court, to be entitled to hold lands in *India,* and devising the same by Will, differ? Against the finding of the Court, no question was raised, and it cannot now, as an after-thought, be impeached ; General *Martin* must be presumed to have been legally entitled, and to have acquired a license to hold lands, in pursuance of the regulations.

II. With regard to establishment of the College at *Lucknow* : The rule of the Court of Chancery here is, that it does not interfere in the execution of a foreign charity ; and the doctrine of *cypres* does not apply to such cases. The Master, after a second reference, has found, that the Supreme Court cannot carry that part of the testator's Will into effect ; that finding is confirmed, and a decree made thereon : that, therefore, is, in effect, a declaration by the Court, that the charity cannot be established; any any new inquiry is inconsistent with that decree—*Morgan* v. *Evans.*[*] But, suppose it otherwise, how can the Court give effect to the charity? Upon the further report obtained, the Master finds, that the government is willing to receive, and apply such sums, as the Court shall decide, applicable to the charity. In the first place, that is not a finding, that the government can give effect to the charity ; and, in the next place, if it were, it is not such a mode of giving effect to it, as the Court could, or ought, to sanction. What security can the Court have, that the charity will ever be established; or, if established, will be permanent? The Supreme Court can exercise no control over the Governor-General ; nor can the government ensure the existence of the charity for one moment, after it has parted with the funds. The case of *Attorney-General* v. *Bishop of Chester*, was a prospective charity : the fund was to be applied, if a certain state of things ever took place ; and the Court necessarily retained possession of the fund, to wait the happening of the event contemplated. That is not the case here. The college at *Lucknow* is not to be established upon a future contingent event; but it is directed to be founded, and established, immediately. In the *Attorney-General* v. *Lepine*,* a reversionary estate, bequeathed to the minister and church officers of a parish in *Scotland*, for charitable purposes, was directed to be invested in stock, in the name of the Accountant-General, and the dividends to be paid, from time to time, to the minister and church officers of the parish : but the Courts of *Scotland*, having jurisdiction to administer the charity, an order, confirming the Master's report, in approbation of a scheme, was reversed. In the *Attorney-General* v. *Stephens*,† the Court proceeded only so far as to appoint a trustee of a fund bequeathed to a foreign charity : it did not pretend to appoint a scheme ; but simply, upon the well-known principle of the Court, that a trust never fails for want of a trustee, it appointed one in the room of the British Consul-General and treasurer of the British contribution fund in *Lisbon,* whose office, at the decease of the testator, no longer existed. That is wholly inapplicable to the case now before the Court. There is no want of a trustee here, because, in fact, there is no trust to execute. The King of *Oude* does not claim the fund : there is no hand to pay it to : it must, therefore, fall into the general funds of the testator, and form part of the residue. The doctrine of *cypres* cannot be applied to a foreign charity : the King's sign manual cannot operate beyond the jurisdiction of the King's Courts : there is no principle, or decision, for such a proposition. Upon the authority of the *Attorney-General* v. *The Ironmongers' Company,* the third part of the residue, set apart for the college at *Lucknow,* if it does not go to the next of kin, must go to augment the several charities mentioned in the Will. The Mayor of *Lyons* would, in such case, be entitled to a moiety of such third.

---

[*] 8 Bligh., New Series, 777, 797, 819.

---

* 2 Swan. 181.

† 3 Myl. and Keen, 347.

22 February 1837.

Lord BROUGHAM :

The first, and by far the most important, question, brought before us, in this case, is, whether or not the testator, being an alien, could devise his real property : in other words, whether, or not, that portion of the English law, which incapacitates aliens from holding real estates to their own use, and transmitting it, by descent or devise, extends to *Calcutta,* and to the *Mofussil.*

As the argument, for its extending to *Calcutta,* is very much stronger than that for its extending to the *Mofussil,* it may be well to consider the former in the first place.

It is agreed, on all hands, that a foreign settlement, obtained in an inhabited country, by conquest, or by cession from another Power, stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling an uninhabited country.

In the latter case, it is said, that the subjects of the Crown carry with them the laws of *England,* there being, of course, no *lex loci.* In the former case, it is allowed, that the law of the country continues until the Crown, or the legislature, change it. This distinction, to this extent, is taken in all the books : it is one of the six propositions, stated in *Campbell* v. *Hall,* as quite clear, and no matter of controversy in the case. And it had been laid down, in *Calvin's* case; in *Dutton* v. *Howell* ;* in *Blankard* v. *Gadd,* (Salk.,) by Lord *Holt,* delivering the judgment of the Court ; and nowhere more distinctly, and accurately, than in the decision of this Court.† Two limitations of this proposition are added, to which it may be material that we should attend. One of these refers to conquests, or cessions. In *Calvin's* case, an exception is made of infidel countries ; for which it is said, in *Dutton* v. *Howell,* that, though Lord *Coke* gives no authority, yet it must be admitted, as being consonant to reason. But this is treated, in terms, as an "absurdity," by the Court, in *Campbell* v. *Hall* : the other limitation refers to new plantations. Mr. Justice *Blackstone,*‡ says, that only so much of the English law is carried into them, by the settler, as is applicable to their situation, and to the condition of an infant colony. And Sir *Wm. Grant,* in *Attorney-General* v. *Stuart,*§ applies the same exception, even to the case of conquered or ceded territories, into which the English law of property has been generally introduced. Upon this ground, he held, that the Statute of Mortmain does not extend to the colonies governed by the English law, unless it has been expressly introduced there; because it had its origin in a policy peculiarly adapted to circumstances of the mother country.

---

* Shower, Parl. Ca. 24.

† Anon.—2 Peere Will. 75.

‡ 1 Bl. Com. 106.

§ 2 Mer. 161.

Then, is *Calcutta* to be considered as an uninhabited district, settled by English subjects ; or as an inhabited district, obtained by conquest or cession? If it falls within the latter description, has the English law, incapacitating aliens, ever been introduced? If that law has never been introduced, has there been such an introduction of the English law, generally, that those parts, which have been introduced, draw along with them the law touching aliens? An answer to these three questions, if it do not exhaust the argument, seems to carry us sufficiently near to the conclusion at which we seek to arrive; and it will include a consideration of the only reason for the proposition upon which the judgment below is mainly rested, *viz.*, that the royal prerogative extends necessarily and immediately, to all acquisitions, however made, and that the forfeiture of aliens real estate is parcel of that prerogative.

1. The district on which *Calcutta* is built, was obtained by purchase, from the Nabob of *Bengal,* the Emperor of *Hindostan's* lieutenant, at the very end of the 17th century. The Company had been struggling for nearly 100 years, to obtain a footing in *Bengal,* and till 1696, they never had more than a factory here and there, as the French, Danes, and Dutch also had. Till 1678, their whole object was to obtain the power of trading, and it was only then that they secured it, by a firman from the Emperor; from that year, till 1696, they in vain applied to the native government,

for leave to fortify their factory on the *Hoogly*, and it was only then that they made a fortification, acting upon a kind of half consent, given in an equivocal answer of the nabob; encouraged by the protection which they were thus enabled to afford the natives, many of them built houses, as well as the English subjects; and when the nabob, on this account, was about to send a cady or judge, to administer justice to those natives, the Company's servants bribed him, to abstain from this proceeding. Some years afterwards, the Company obtained a grant of more land and villages from the emperor, with renewed permission to fortify their factories; during all this period, tribute was paid to the emperor, or his officer, the nabob; first, for leave to trade, afterwards as *zemindars*, under the emperor; and in 1757, the year memorable for the battle of *Plassey*, the treaty with *Jaffier Ally*, indemnifying them for their losses, ceding the French possessions, and securing their rights, and binding them to pay their revenues like other "*Zemindars.*" Eight years later, they likewise received from the native government, a grant of the *Dewanny*, or Receivership of *Bengal*, *Bahar*, and *Orissa*; and of their subsequent progress in power, it is unnecessary to speak; enough has been said, to show that the settlement of the Company in *Bengal* was effected by leave of a regularly-established government, in possession of the country, invested with the rights of sovereignty, and exercising its powers: that by permission of that government, *Calcutta* was founded, and the factory fortified, in a district purchased from the owners of the soil, by permission of that government, and held under it, by the Company, as subjects owing obedience, as tenants rendering rent, and even as officers, exercising, by delegation, a part of its administrative authority. At what precise time, and by what steps, they exchanged the character of subjects for that of sovereign, or rather, acquired by themselves, or with the help of the Crown, and for the Crown, the rights of sovereignty, cannot be ascertained ; the sovereignty has long since, been vested in the Crown, and though it was at first recognized in terms by the legislature, in 1813, the statute 53 *Geo.* III, c. 155, s. 95, is declaratory, and refers to the sovereignty, as "undoubted," and as residing in the Crown ; but it is equally certain, that for a long period of time after the first acquisition, no such rights were claimed, nor any acts of sovereignty exercised ; and that during all that time, no English authority existed there, which could affect the land, or bind any but English subjects. The Company and its servants were then in the situation of the *Smyrna,* or the *Lisbon* factories, at the present time.

2. The next question is, has the English law, incapacitating aliens, ever been introduced? It follows from what has been observed, not only that *Calcutta* was a district acquired in a country peopled, and having a government of its own, but that, for a long course of time, no such law as that which incapacitates aliens, could be introduced, any more than it could now be introduced into such part of the Asiatic, or Portuguese territory, as those factories may occupy. But even where the sovereignty rested in the Crown, there is every argument of probability, against a law being introduced, so inapplicable to the circumstances of the settlement. Sir *William Grant's* reasons for confining the Mortmain Act to *England,* have a manifest application to this case ; for though they are mainly drawn from the provisions of that act being adapted to

the peculiar circumstances of the mother country, they plainly proceed upon the assumption, that the intention of the legislature to confine the operation of the act may be gathered from thence ; and it should seem that such intention is even more directly to be gathered from the fact, that the provisions in question are manifestly inapplicable to the circumstances of the settlement. At whatever time the sovereignty was acquired, and the power of introducing the alien law became vested in the Crown, the real property in *Calcutta* must have been held indiscriminately by subjects and foreigners ; the sudden application of such a law, is, in the highest degree, improbable, because it would work great inconvenience, and grievous injustice ; but, if the sovereignty was gradually acquired, if the transition of the Company from the state of subjects under the Mogul, to an independent authority, was slowly made, by imperceptible steps, the introduction of the alien law became still more improbable ; for no act could then be done by the party obtaining the dominion, nor any stipulation made by the party becoming subjects, to secure the rights of the one, or restrain the power of the other. This may always be done where a conquest, or cession, at once vests the sovereignty of a district in one State, which had previously belonged to another ; the treaty may ascertain, and almost always does ascertain, the relative rights of the parties, as to the property of the country ; but in the present case, no such definition could possibly take place ; and this exceedingly increases the improbability of such a law having been introduced at all.

Nor does the argument rest here ; the well-known facts are wholly inconsistent with the supposition that this law ever was in operation, and the acts of the sovereign power, the legislative acts of the Crown, and of those to whom its authority is delegated, and the acts of the Parliament itself, plainly proceed upon the footing of this law never having extended to *Bengal.*

The facts must, of necessity, be numerous, and of constant occurrence, for every foreigner holding a house by lease, or by freehold tenure, affords an instance of the law not being in operation ; and no instance has been produced,—indeed it is agreed on all hands, that no instance has ever existed,—of a forfeiture to the Crown for this cause. There is no such a thing known in those parts, as an inquisition of office, or any analogous proceeding, or any proceeding whatever, for entitling the Crown, or those exercising its delegated authority, to the real estate, or chattels real of aliens, within the district. When those foreigners die, their real estates have descended to their heirs, or been taken by their devisees, or been administered as assets, by their executors, without any claim ever having been made by the sovereign power, which would, here in *England,* have been entitled without any office. Ejectments have been brought, and the parties in possession have never been advised to set up the defence, that the lessor of the plaintiff, claimed by descent from an alien, and dower has been assigned to widows alien, also. Previous to 1826, which is a long time after the present proceedings were instituted, and after the first decree in the cause, no mention of the subject appears ever to have been made, in any place, or in any court of justice ; assuredly, if the law be as is contended, and the Crown by law is entitled, no one can contend that it is too late to declare the law, and enforce the right ; but the whole question turns upon this,—has the law in question been introduced ? and the non-claim

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

is material, to show that it has not been introduced, because it is not merely the acquiescence of a party; it is the acquiescence of that power which alone possessed the right to introduce the law, and affords strong proof that this power never had introduced it.

But the acts of the same power, afford positive evidence, yet more distinct. The charter of the 13 *Geo.* I, expressly sets forth, that the intention of the Crown is, to induce foreigners to settle within the district:—"Whereas, the East India Company have, by a strict and equal distribution of justice, very much encouraged, not only our own subjects, but likewise, the subjects of other provinces, and the natives of the adjacent countries, to resort to, and settle in the said towns, factories, and places, especially in *Calcutta, Madras,* and *Bombay*;" to enable them the better to administer justice, corporations of mayor and aldermen are constituted, with power to administer justice; and it is expressly provided, that of the aldermen, seven shall be natural-born subjects, and two may be subjects of any other province or State, in amity with the Crown, and all of these are to be chosen from the principal inhabitants of the Presidencies. In the successive renewals of this charter, down to the end of *George* II, the only change in the province is, adding the qualification, that of the nine aldermen, the two foreigners shall be Protestants. This charter could hardly have been so worded, had the Crown intended that aliens should be incapable of holding lands; and it certainly could never have contained the provision directing two aliens to hold offices of trust, under the Crown, or directing all the aldermen, including the aliens, to be chosen out of the principal inhabitants, if the general incapacities of aliens, by the English law had been intro-

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

duced into *Bengal*; for even if their disqualification to hold office can be traced no higher than the statute, there can be no argument raised in favour of the introduction of this part of the English law into *Calcutta*, before the statute 11 & 12 *Will.* III, c. 44, was passed.

Observe too, in what way the supreme authority in *Bengal*, exercising the delegated powers of sovereignty, regards aliens; and mark if it views them as at all on a different footing from subjects in respect of rights of property. The Regulation 38, A.D. 1793, was made, as the title states, to enforce the "existing rules against Europeans of any description holding lands without the sanction of the Governor in Council;" and the third section enacts, that "no European, of whatever nation or description, shall purchase, rent, or occupy, directly or indirectly, any lands out of the limits of *Calcutta*, without the sanction of the Governor-General in Council; and all persons now so holding land beyond the limits of *Calcutta*, without having obtained such permission, in opposition to the repeated prohibitions of Government, or who may hereafter so purchase, rent, or occupy land, shall be liable to be dispossessed of the land, at the discretion of the Governor-General in Council, nor shall they be entitled to any indemnification for buildings which they may have erected, or other account." No statute made for *England* could have been so framed. It would have been absurd to prohibit Europeans, "of whatever nation or description," doing that which only one class of Europeans, *viz.*, British subjects, could by law do. The provision of the *Bengal* regulation, manifestly proceeds upon the assumption, that persons other than subjects, could, but for the prohibition, and the former rules which it is made to enforce, have held lands. It declares that aliens, as well as subjects, shall be liable to be dispossessed of lands purchased contrary to the enactment, which would have been wholly absurd if aliens had been liable to be dispossessed upon office found, whether the prohibition had been issued or not. It would be difficult to produce a clearer recognition, that the sovereign power did not consider that the alien law had ever been introduced into *Bengal ;* but it seems also to admit, that in *Calcutta,* and notwithstanding the prohibition, foreigners as well as subjects, might hold lands without licence, for it confines the prohibition to the *Mofussil* : "out of *Calcutta*" are the words.

The same inference is more strongly raised by the statute 9 *Geo.* IV, c. 33, "for declaring and settling the law respecting the liability of the real estates of British subjects and others within the jurisdiction of the Supreme Courts in *India,* as assets for the payment of the debts of their deceased owners." It declares and enacts, that when any British subject shall die seised of, or entitled to, any real estate in houses, lands, or hereditaments, or "whenever any person, not being a Mahomedan, or Gentoo, shall die so seised or entitled, then such real estate of such British subject, or other person as aforesaid," shall be assets ; and it afterwards declares the executor or administrator "of such British subject, or other person," entitled to sell and dispose of such real estate, and to convey and assure the same to purchasers, in as full and effectual a manner as the testator or intestate, could or might have done in his lifetime. Surely this could have no meaning, unless persons other than British subjects, that is aliens, could by law be seised of or entitled to, real estate ; and nothing could be more absurd than to declare, that the executors and administrators of aliens

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

shall be entitled to sell the real estates of aliens, testators or intestates, in as full and effectual a manner in law as the testators or intestates could have done, if those testators or intestates could not in any manner or way have sold or devised, or in any way have dealt with such estates. Suppose such an enactment in any statute relating to this country, and see how absurd it would have been. This seems strongly to prove, that our law as to aliens was not understood by the legislature to have been introduced into *India* before 1828; and yet the earliest of the cases, the only one before the case at bar, had then been decided at *Calcutta*.

But it seems to be contended both here and below, that there is something in the law incapacitating aliens, which makes it, so to speak, of necessary application wheresoever the sovereignty of the Crown is established, as if it were inherent in the nature of sovereign power. To this a sufficient answer has been already afforded, if the acts of the sovereign power to which we have referred, show that no such application to *Bengal* ever was contemplated, unless direct authority can be produced to show that the right is inseparable from the sovereignty, and, as it were, an essential part of it. Now, there is no intimation of any thing of the kind in those cases where the whole subject is discussed most at large, as in *Calvin's* case, where all the doctrines connected, however remotely, with each head of the argument, are broached; Lord *Hale's* famous judgment in *Collingwood* v. *Pace*;* and Lord *Mansfield's* in *Hall* v. *Campbell*. But in the absence of any such authority, the distinct recognition by the sovereign, of the capacity of aliens, is itself a strong authority against the position, which affirms the title of the Crown to aliens estate to be inseparable from the sovereignty. At the very least, it shows either that the right in question does not exist, or that it has been waived and removed.

---

* 1 Vent. 413.

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

It should seem, however, independent of these considerations, that there is no warrant in the nature of the thing for the position, that this right is an incident of sovereignty. It certainly is not an incident to sovereignty; in several other countries the sovereign has no such right. In France, for example, aliens can hold lands without entitling the Crown, and can transmit them to their heirs. This was abrogated by *ordonnaux*, 13th *October* 1814, the *Droit d'Aubaine* having been abolished at the Revolution, and the proviso of reciprocity at the Restoration introduced (provided the law of their own country gives the same right to French subjects then seised of lands). Besides, if reference be made to the prerogative of the English Crown, that prerogative in other particulars is of as high a nature, being given for the same purposes of protecting the State ; and it is not contended that these branches are extended to *Bengal*. Mines of precious metals, treasure-trove, royal fish, are all vested in the Crown, for the purpose of maintaining its power, and enabling it to defend the State. They are not enjoyed by the sovereign in all or even in most countries, and no one has said that they extend to the East Indian possessions of the British Crown.

3. Can it then be contended, that the general introduction of the English law draws after or with it that branch which relates to aliens? This is the third question proposed, and to this an answer, or the materials for an answer, have already been furnished ; for had the negative position only rested upon want of instances where the rights of the Crown had been en-

forced, it might have been said that the general application of the English laws implied that of the portion in question; but the acts of the power which alone would introduce this portion, and which alone introduced the English laws generally, show that it was introduced, not in all its branches, but with the exception of this portion at the least: this must be admitted, unless it can be maintained that there is no possibility of introducing the English laws at all, without introducing every part of them, which clearly cannot be asserted; for notwithstanding the extent to which the laws have been introduced, it is allowed on all hands that many parts of them are still unknown in our Indian dominions.

The argument to which we are adverting assumes, that the English laws regulating real property generally have been introduced, and for this position the case of *Freeman* v. *Fairlie** is cited. But that case only decided that the estate in land and tenants of a British subject in *Calcutta,* was of such a nature as to descend to him according to the English law of succession—that it was freehold of inheritance. It is true that this conclusion was reached by the adoption of the larger position, that the English law had been introduced into the settlement; but whatever went beyond the point of the land being freehold of inheritance was *obiter,* and cannot be said to have been decided. It must further be observed, that the grounds of the more general position, were chiefly the practice of the settlement in regard to the mode of conveyances, *viz.,* by lease and release, with the course of succession, and also the charters of the Company, with the Acts of Parliament referring to them, the charter of the 13 *Geo.* I, being the one principally cited. Now no one who reads that able judgment can entertain a doubt, that the same learned judge, had he been called upon to determine whether or not the law extended to alien incapacities, when he found the practice wholly against this extension without any exception, and when he also found the language of the charters, especially that of 1726, as well as the provisions of the regulations 1793, and of the act passed in 1828, all proceeding upon the supposition of aliens being equally capable with subjects of holding and transmitting real property,—would have decided against extending and applying to the law of alienage, the proposition which he had laid down upon the facts then before him, and upon the branches of the English law connected with the case under his immediate consideration.

---

* Post.

If, indeed, the whole English law of real property, or even all its principal provisions, have been introduced into these settlements, an event which must have taken place many years back, how came it to pass, that as late as 1817 there could have been any question made, whether or not Wills to pass real estate must be witnessed according to the provision of the Statute of Frauds ? Yet it was then, and while *Freeman* v. *Fairlie* was pending before the same Court, for the first time determined, that those provisions extended to *Calcutta* —determined too upon a full inquiry into the facts, and examining evidence of persons conversant with the Indian law ; and it is plain, from the inquiry which Sir *William Grant* had directed, and from what Sir *Thomas Plumer* afterwards says in giving judgment,* that the mere proof of property being fee simple and inheritable by the English law was not deemed sufficient, but a further inquiry was directed, whether it passed by Will, without more than two subscribing witnesses. Nor can any distinction be taken between that case and the present, upon the ground that there the question related to the introduction of a statute, and that here the introduction of the common law is in dispute ; for in *Freeman* v. *Fairlie,* and in almost every question that can be raised, touching the application of the forms of conveyance known in our law, the argument is confined entirely to assurances, which are the creatures of statute. No instance has ever been produced of land passing in *Calcutta,* by the common law conveyance of feoffment and livery. The introduction of the English law is proved by showing, that the mode of conveyance is adopted by lease and release, that is, upon the Statute of Uses.

---

* *Gardiner* v. *Fell*, post.

Reference has been made, both here and in the Court below, to the opinion of Sir *F. Norton,* in 1764,* and the true account of that opinion was given here, though it does not seem to be accurately understood below. It holds very distinctly, that the subjects of a conquered or ceded territory, are only to be considered as not being aliens, by virtue of the treaty which gives them the rights of subjects, and that none but such as can claim the benefit of the treaty can hold or transmit lands. We say this is the purport of the opinion, and that it was so represented here ; for indeed, the argument maintained by the Crown, requires the proposition to be carried thus far—that upon a conquest or cession, all the inhabitants continue aliens after the change of dominion, unless, and until, the conqueror or purchaser grants their naturalization. But this position seems wholly untenable, for all the authorities lay it down, that upon a conquest, the inhabitants *ante nati*, as well as *post nati*, of the conquered country become denizens of the conquered country; and to maintain that the conquered people become aliens to their new sovereignty upon his accession to the dominion over them, seems extremely absurd,—almost as inconsistent with common sense as it would have been to hold the English inhabitants aliens under *James* I, at a time when there was even a question raised whether the *ante nati* of *Scotland* did not become by his accession denizens in *England*. The Court below, it must be observed, distinctly admit that conquest operates what they term a virtual naturalization. But Sir *F. Norton* holds, that without express provision in a treaty, the subjects conquered are aliens; even if all the rest of the argument be admitted, still it cannot be denied that the Crown may relinquish its prerogative; indeed, whenever the inhabitants of conquered provinces are held to obtain the rights of subjects by treaty, (and even Sir *F. Norton* has no doubt of this being possible,) those who hold the doctrine the most vigorously, must say that the treaty is a voluntary abandonment of a right of the Crown. It evidences the will of the sovereign to exempt the conquered territory from this branch of his prerogative. But the same will of the sovereign may be collected from other circumstances, and the like abandonment of the prerogative be thus evidenced. The charters, regulations, and the Act of Parliament, to which reference has so often been made, appear sufficient circumstances from which to collect this will of the sovereign, and so prove the abandonment in the present case: and this even upon the supposition, that in consequence of the prerogative being generally admitted, the proof lies on

---

* 2 Chal. Opinions, *supra.*

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

those who would set up an exemption; on those who would show that the English law of forfeiture, was not introduced into *Calcutta*,—rather than on those who undertake the affirmative proposition.

Upon the whole, their Lordships are of opinion that the law, incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into *Calcutta*. There appears still less reason to hold that it has ever obtained a footing in the *Mofussil*; but into the additional grounds for differing with the Court below, upon that part of the case it is unnecessary to enter, as we consider that the decree must be reversed upon the part relating to the *Calcutta* property, and therefore, can have no doubt as to pursuing the same course with the part relating to the *Mofussil* property. Upon this branch of the cause, therefore, it will be necessary to reverse that part of the decree which declares that the testator having been an alien at his decease, his lands and houses in *Calcutta*, would not pass by his Will; and that there was not evidence sufficient to determine whether or not the testator's lands and hereditaments in the *Mofussil*, could pass by his Will, together with the consequential directions; and then to declare that all the real property of which the testator died seised within the Presidency of *Fort William*, whether in *Calcutta* or not, except in *Chandernagore*, passed by his Will, and formed part of the residue; and an inquiry must be directed as to the nature and tenure of the property at *Chandernagore*, and the usages and laws prevailing there, touching the right of an European alien to devise the same, confining the inquiry directed by the decree to such property, and to ascertaining what part of the funds now standing to the account of the cause, has arisen from the rents and profits of the property at *Chandernagore*, and the interest of those rents and profits.

II. The next point is raised by the course pursued below, upon the Master's report of the 19th *July* 1830, the re-hearing,—25th *July* 1831, and the Master's report, of 1831; and this becomes very material, as involving the question, whether or not the Court was concluded as to the bequest for *Constantia* College, or the *Lucknow* charity, by what the Master had in the first instance found, and by his finding being confirmed.

The decree, 2nd *December* 1822, directed an inquiry, whether the college could be established, and whether the bequest of 4,000 rupees for liberation of prisoners at *Lucknow*, could be carried into effect with reference to the testator's intention, and the sanction and dispensation of the *Lucknow* Government. The Master, 3rd *February* 1830, made his report in the negative, as to the 4,000 rupees, following the words of the decree; and as to the college, he reported that there was not sufficient evidence before him, to enable him to report; but as no further evidence was likely to be obtained, he annexed that which had reached him, the most material part of which, was a statement of the Resident, that the King of *Oude* would not object to the establishment, but would hold out no expectation of his countenancing or supporting it.

To this an exception was taken, on the ground that the Master had not reported as directed; and the exception being allowed, it was referred back to the Master, who reported, 9th *July* 1830, that neither the establishment of the college, nor the bequest of 4,000 rupees, could, with reference to the testator's intentions, and the sanction and disposition of the *Lucknow*

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

Government, be carried into effect. This second report was confirmed by an order made 17th *February* 1831, which stands still unaltered. Notwithstanding this, the Court, on the re-hearing, referred it to the Master, to inquire and report whether or not the Governor-General in Council, had the means of giving effect to the bequests above mentioned ; and whether the Governor-General would receive, or authorize some one to receive, the fund for these purposes. The Master, on the 5th *November* 1831, reported that the Governor-General was willing to do so, and annexed to his report the letter of the Government secretary, stating that the Government had no objection to apply the money through the Government agent, at *Lucknow*. But the Master did not answer the most material question put to him ; he did not report whether or not the Governor-General had the means of giving effect to the bequests. The Court, however, on the 20th *March* 1831, confirmed the report, and decreed, that, as it was unable to give effect to the bequest itself, and as the Governor-General had the means and was able to give effect to the bequest, and was willing to receive the fund, it should be paid over to him, or such person as he should appoint.

The irregularity of the whole proceeding is manifest. The Master's report stands confirmed, that the bequests could not at *Lucknow* be carried into effect, and the subsequent reference for inquiry, the report and confirmation, with the decree proceeding upon it, could not be made while that order stood. In the Courts of this country, there could be no doubt at all upon this head : even this would have been set aside as of course ; and although sitting in this place, their Lordships are in the practice of refusing to let mere matter of form shut them out from the substantial merits, yet the irregularity, and indeed the total inaptness of the proceeding, is such as could not have been disregarded, had it not been for one consideration of material importance. There was no party in the Court below, interested in objecting to this proceeding, or rather, indeed, all parties might be said to have an interest in letting the irregularity pass, and the first report, with the order confirming it, stands. Their Lordships do not therefore think that they should satisfy the justice of the case, were they to suffer the objection now to be taken with effect, and the material portion of the decree, to be thus frustrated. But it was fit to mark their opinion of the irregularity, which, in any other circumstances, must have proved fatal. There is another material consideration, besides the one already stated, in favour of getting over the irregularity in the present instance. The first inquiry and report set forth, that the bequest could not be carried into effect, with reference to the sanction and disposition of the Government of *Oude.* Now the evidence only states, that the King of *Oude* has no objection to the establishment, though he will not promise to encourage it by his countenance and support. The report then seems to go beyond the evidence as regards the college, though it seems quite correct as regards the 4,000 rupees. The inquiries afterwards directed, apply to the proposed interference of the Governor-General, to aid the establishment of the college with the *Lucknow* Government ; and it may be contended, that if the first report had been more in accordance with the evidence, there would not have been any material discrepancy between its finding, and the subsequent inquiry ; for the subsequent inquiry

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

might be only to ascertain whether the means existed, with the help of the Governor-General. Then, supposing the irregularity got over, we come to the next question.

III. Can the decree, as to the application of the fund, stand?—Shall the fund be applied to the establishment and support of a college at *Lucknow*?—Shall it sink into the residue, and be divided between the two charities appointed to be established at *Calcutta* and at *Lyons*?—for the cases of *Attorney-General* v. *Bishop of Llandaff,* and *Attorney-General* v. *Ironmongers' Company,* make it clear that in this case, which is indeed stronger than either of those, the other two charities must take, if the gift fails as regards the third. If the fund is to be applied in *Lucknow,* shall it be applied as the decree directed, or in what other way?—But it must here be observed that the decree assumes the Master to have reported on the evidence before the Court, to have proved that the Governor-General has the means of giving effect to the bequest at *Lucknow* ; but this nowhere appears in any way. The report of the 5th *November* 1831, states that the inquiry directed, had been made; *viz.,* whether the Governor-General had the means of giving effect to the bequest, and was willing to receive the fund, and apply it ; but only adds, that the Governor-General was willing, without stating whether or not, he had the means. The correspondence annexed to the report, contains a question put to the Governor-General, by the Company's acting Attorney, whether or not, by the Court declaring its own inability to give effect to the bequest, (but stating that the Governor-General had the means of so doing, and was willing to receive and apply the fund,) would be proceeding upon a right construction of the Governor-General's former answer, that the services of the British officer at *Lucknow,* would always be available for the purpose required? The answer of the Governor-General avoids the question as to his having the means, and only states, that if the Court chooses to leave the entire matter to the Government, he sees no objection to transfer the duty to the agent at *Lucknow,* and will receive and apply the fund. In returning this answer, the Government secretary refers in terms, to the words of the proposed decree, as stated in the question put by the Company's acting Attorney, and as he is silent upon the material portion of those words, referring to the Governor-General having "the means," there seems no room to doubt that the question is purposely avoided. We do not therefore think it possible, that this part of the decree can stand, because the foundation is removed on which it is rested. The Court must have an answer to the inquiry, and a reasonable ground for assuming that the bequest can be carried into effect, before it can part with the fund. But the manner in which it is proposed to part with the fund is also, in our opinion, improper. The Court gives the control of it, not to any party, or any competent authority, pointed out by the testator, as was done in the case of the *Provost and Bailiffs of Edinburgh* v. *Aubrey,* in *Oliphant* v. *Hendrie,** and the other cases of this class; nor does it give the control and management to any person under its own superintendence, and amenable to its jurisdiction; giving it to the Government, is letting go all hold over it, and at once departing with its jurisdiction to those who can never, in any way, be interfered with, or called to account. It appears clear, that if the Court had been satisfied of the means existing for effecting the testator's purpose at *Lucknow*, there should have been appointed a trustee or trustees for applying the fund, under the superintendence of the Court, and that these trustees should, therefore, have been persons residing within its jurisdiction, and if officers of its own, so much the better.

---

* 1 Bro. C. C. 571.

This part of the decree must therefore be altered, by reversing the part which declares that the Governor-General had the means, and was able to give effect to the bequest for the college at *Lucknow*, and such part of the consequential directions as relates to paying over the fund to the Governor-General, or person appointed by him. But the part of the decree declaring the bequest of 4,000 rupees void, is to stand, and also the part relating to sums which may be due to persons on account of any expenditure already made at *Lucknow*. Then for the part reversed, there must be substituted a direction that further inquiry be made as to the power of the Governor-General to aid trustees, to be appointed by the Court, in giving effect to the bequest regarding the college ; and if the Court shall be satisfied that in this, or in any other way, such trustees can give it effect, then the fund is to be paid over to such trustees, who are to report, from time to time, to the Master, and to administer the fund under the superintendence of the Court ; the Court giving such directions as may be necessary to establish the charity according to the Will. Their Lordships are well aware that in pursuing this course, they are sanctioning a proceeding, for which there is no exact and complete precedent in the administration of charitable funds in this country ; but, in one respect, there is sufficient authority, *viz.*, as far as regards a postponement of distributions, and the not declaring the gift

1836.

MAYOR OF LYONS *v.* EAST INDIA COMPANY.

void, on account of any present difficulty in giving it effect: the case of *Attorney-General* v. *Bishop of Chester*, furnishes a direct authority for not declaring a legacy void, because it was for an object which could not, at the time, be accomplished, and for retaining the fund in Court until it should be possible to apply it; no doubt if, in that case, some years had elapsed, and no prospect appeared of an episcopal establishment in *Canada*, the Court would then have declared the legacy void, and distributed the fund to the parties entitled; so here, if it shall be found either at first, that there can be no application of the fund in the manner directed by the Will, or that the trustees, after making the attempt, fail in it, the Court will then direct the same application to be made of it, which they would have done had the bequest been at first declared void.

Where there exists a party entitled to receive a fund bequeathed for a foreign charity, there can be no objection made to give over that fund to him, and allowing him to administer it in the country in which the charity is to be established; this has been repeatedly done, both where a party was within the jurisdiction of the Court, and where he was beyond it, as *Mornet* v. *Vulliamy* (Switzerland), and *Marton* v. *Paxton* (Lyons), and *Emery* v. *Hill*,* which followed the former precedents.

The Court has gone further of late years, than Lord *Hardwick* thought he could in *Provost of Edinburgh* v. *Aubrey*, for he then held that he could give no directions as to the distribution. But in *Cadel* v. *Grant* 1795, *Oliphant* v. *Hendrie*, and in *Attorney-General* v. *Lepine*, the Court interfered with the application of the fund, directing a scheme to carry the charity into execution. In the latter case the objection was taken to the jurisdiction, on the ground that the charity was to be executed in *Scotland,* but it was abandoned, and the decree affirmed on the re-hearing. In a subsequent stage of the same cause, the objection appears to have been renewed with effect: for there is a report of a re-hearing of the former decree, when Lord *Eldon* reversed so much of it as directed the scheme approved by the Master to be carried into execution. There is another case, the *Attorney-General* v. *the Mayor of London,** as to a charity in *America,* in which no difficulty was held to exist in directing a scheme, as long as the American settlement remained under the Crown, but then it was contended that, the moment they became severed, by the cession at the end of the American War, the objection for the first time arose. The Court appears there, nevertheless, to have directed a scheme, though it was said, and justly said, that exactly the same objection as to the jurisdiction existed to the scheme being directed before the severance as since; for the Court of Chancery had no jurisdiction before the severance to grant a scheme, except to a party within its jurisdiction: the Court operating through those parties, the severance made no difference in that respect. The difficulty in the present case arises from there being no party entitled to receive and administer the fund abroad, to whom the Supreme Court in *Bengal* could hand it over, and no person within its jurisdiction who could administer the fund under its superintendence. But, as in this country the Court has directed a scheme where there was a party, so it has also supplied the want of a trustee. In *Attorney-General* v. *Stephens,* the charity was to be executed in *Lisbon*, and two trustees had been named by the testator, one of whom was an official person, under an Act of Parliament, which being repealed, the co-trustee only remained. This was the Consul-General, and he refused to continue in the trust without another to aid him. The Master of the Rolls appointed a new trustee on the Consul's application. Possibly this decision, taken with the former one, may afford a precedent sufficiently near the present, to warrant the course taken. But its complete justification must be sought in the peculiar circumstances of the case, and where there exists any possibility of pursuing the declared intention of the testator, upon the subject of which of all others, he plainly was the most anxious, their Lordships would be very unwilling to frustrate that intention by directing the funds to other objects. This seems to have been the strong inclination of the Court below, and we only differ with them as to the means of giving effect to it.

---

* 1 Russell 112.

---

* 2 Swan. 180; 3 Bro. C. C. 171; 1 Ves. J. 243.

This, however, is not the peculiarity to which we principally refer. The objection in the ordinary case to administering a foreign charity under the superintendence of the Court, is this : those who are engaged in the actual execution of it, are beyond the Court's control, and those who are within the jurisdiction, are answerable to the Court for the acts of persons as to whom they can derive no aid from the Court. Such an office will not easily be undertaken by any one ; and its duties cannot be satisfactorily performed ; at least the party must rely more on the local, that is the foreign authorities, for help, than on the Court to which he is accountable.

But in the present case, there is reason to hope for the interference of the Government.

1836.

MAYOR OF LYONS v. EAST INDIA COMPANY.

The Court cannot shut its eyes to the weight which that Government has with the Court of *Lucknow.* It can hardly be said, that the authorities there are wholly on the footing of a foreign and unconnected, though possibly they may be an independent, State, and there seems sufficient ground for expecting that the Supreme Court may find fit persons, possibly official persons, willing to undertake the office of administering the charity under its superintendence. The jurisdiction of the Court, moreover, extends over all British subjects residing within the limits of the charter, whether in the British or native dominions, and this affords facilities for the execution of the charity under the Court's superintendence, which could not exist in any of the cases cited.

IV. The question on the Mortmain Act cannot be said any longer to exist in the cause. It is agreed, on all hands, that the statute does not apply to *India.* With respect to the application of the fund, should the execution of the bequests be found impossible, their Lordships decline giving any directions, because it might produce an impression that they doubt the possibility.

Whereas upon all the facts in the case, and all that is known of the state of affairs in the *East Indies,* they entertain no doubt whatever respecting it.

V. The Court below properly ordered the costs of all parties to be taxed, as between solicitor and client, and paid out of the general fund standing to the credit of the four causes. The costs and charges of the present appeal must be taxed in like manner, as between solicitor and client, and paid out of the fund standing to the general credit of the cause ; the sum advanced being liable to apportionment among the funds, when the cause goes back to the Supreme Court.

In pursuance of the above judgment, the Judicial Committee presented their report to His Majesty in Council, setting forth the several points in which the decree in the Court below ought to be reversed; and declaring, with respect to the *Lucknow* charity, "that, "the same should be reversed, and that instead "thereof, it ought to have been, and should be de-"creed and declared, that if the whole sum of 2,00,000, "sicca rupees, bequeathed in the thirty-third article of "the said Will of the testator, *Claude Martin,* for the "finishing the house of *Constantia,* hath not been ex-"pended and applied for that purpose, whatever may "remain thereof, ought to be set apart from the funds "now standing to the general credit of the said causes, "and carried to a separate account, to be entitled,— "'the building and repairing fund for the house and "'establishment at *Constantia*,' subject to the further "direction of the Supreme Court, and without preju-"dice to the final application of the same fund, un-"der the directions hereinafter contained, or other-"wise; and that the said Supreme Court should give "all necessary directions for that purpose; and that "out of the same funds, standing to the general credit "of the said causes, a further sum of 1,00,000 sicca "rupees, being the amount bequeathed in the thirty-"third article of the said Will, for the support of a "college and school at *Lucknow,* together with accu-"mulations of interest on the same, from the death "of the said testator until the setting apart of the "same, be set apart and be carried to a separate ac-

" count in the said causes, to be entitled,—'*Lucknow* " 'college and school fund,' subject to the further order " of the Supreme Court, and without prejudice to any " question as to the final application of the same fund, " under the directions hereinafter contained, or other" wise ; and that out of the funds, standing to the ge" neral credit of the said causes, the further sum of " three lacs of rupees, or so much thereof, as the said " Court shall find necessary, be also set apart, without " prejudice to any question as to the final application " of so much of the interest thereof, under the said " Will applicable to the maintenance of the charitable " establishment at *Lucknow,* and subject to the fur" ther order of the Court ; but in the meantime, " any monthly or periodical payments which shall " have been directed by the Supreme Court, to be " paid out of such interest, are to be continued. And " their Lordships do agree further, humbly to report " that it should be referred to the Master of the said " Court, to inquire and report to the said Court, whe" ther it is in the power of the Governor-General in " Council, at *Fort William,* in *Bengal,* to aid trustees " to be appointed by the said Supreme Court, so as to " enable them to give effect, according to the said tes" tator's Will, to the bequests respecting the charitable " establishment and institution at *Lucknow,* contained " in the Will of the testator, and thereby directed " to be attached to the establishment of *Constantia* " House, or whether any other, and what means, " through the medium of trustees, exist for giving " effect to such bequest ; and that if it shall appear " that by the aid of the said Governor-General in " Council, or otherwise as aforesaid, effect can be " given to the said bequest, some proper persons be "appointed by the said Supreme Court, to be the "trustees of the said charity, to whom the interests "of the funds applicable for the support of such charity, should be from time to time paid, to be by "them applied and administered under the superintendence of the said Supreme Court, in founding, "establishing, and keeping on foot, the said charity; "and that the Advocate-General, the plaintiff in the "first, and the defendant in the third of the above-"mentioned causes, should be at liberty to propose "proper persons to be such trustees.

"And their Lordships do agree further, humbly to "report, that in all other respects, the said decree "should be affirmed."

On the 1st of *March* 1837, this report was taken into consideration by His Majesty in Council, and being allowed, it was ordered accordingly.

In Chancery.

GARDINER *v.* FELL.*

Will—Will attested by only two witnesses—Validity of to pass occupancy lands in Bengal—*Heir-at-law taking legacy under unattested Will—Right of to question title of devisee—Election.*

Rolls Court, 29th July 1819.

Lands in the *East Indies,* held by a tenure of the nature of fee-simple, do not pass by an attested Will, but descend to the person who would be heir-at-law in *England.* A., by an unattested Will, devises lands to B.; B. receives the rents, and by a Will, also unattested, gives the lands, together with a legacy, to the heir-at-law of A.: The heir may receive the legacy, and also call for an account of the rents received by B.

ANDREW GARDINER, late of the civil service of the East India Company, and a resident at *Calcutta,* by his Will, dated 6th *October* 1805, attested by two witnesses only, gave and bequeathed to trustees, all and every description of property that he was then or might be

---

* The importance of this and the subsequent case of *Freeman* v. *Fairlie,* as deciding the nature of the tenure of lands in British India, has induced the Editor to insert them. The case of *Freeman* v. *Fairlie* never having been reported, is compiled from the papers in the cause, and the short-hand-writer's note of Lord *Lyndhurst's* judgment. The Editor regrets he is unable to give the arguments of Counsel, but cannot find that any note of them has been preserved.

1819.
Gardiner
v.
Fell.

thereafter possessed of. He directed his trustees to discharge all just demands against him, and to pay a legacy of £100. to an aunt ; and then gave and bequeathed the remainder of his property to his mother, *Euphemia Gardiner,* for her sole and exclusive benefit. The testator died in the month of *March* 1806, leaving *Euphemia Gardiner* surviving him, and the plaintiff *Andrew Gardiner* his heir-at-law.

At the time of his death, and of making his Will, he was possessed of an estate, situate at *Barrisaul,* in *Bengal,* the rents and profits of which, *Euphemia Gardiner* received till her death, in the month of *March* 1813. By her Will, dated the 14th *February* 1812, but not executed and attested so as to pass real estates, she gave to the plaintiff, her grandson, £1000. sterling, and also the *Barrisaul* estate, or whatever it might have produced ; and she appointed the defendants her executors.

The bill was filed by the plaintiff, an infant, submitting, that as the Will of *Andrew Gardiner,* the testator, was not attested by three witnesses, it did not pass the estate at *Barrisaul,* and praying for an account of the rents and profits received by *Euphemia Gardiner* during her life, or by the defendants since her death, and also for the legacy of £1000. bequeathed to the plaintiff by her Will.

The defendants by their answer, said, that having information that a part, if not the whole, of the said estate, was subject to a ground-rent, and not knowing the tenure of the said lands in *Barrisaul,* and not admitting the same to have been freehold, they submitted, whether, under the circumstances in the bill mentioned, the said testatrix was entitled to the said real estates, or to the rents and profits thereof, or otherwise ; or whether for the reasons aforesaid, the Will of the said testator, *Andrew Gardiner,* was void as to passing the estates at *Barrisaul* aforesaid ; or whether the said estates or any part thereof, did, upon the death of the said testator, *Andrew Gardiner,* descend upon the said plaintiff, as the heir-at-law of the said *Andrew Gardiner.* They admitted the plaintiff to be heir-at-law of *Andrew Gardiner* ; but said, that under the circumstances aforesaid, they were unable to decide whether the plaintiff was entitled to the estates at *Barrisaul,* as heir-at-law ; and they said that they had been advised, and submitted that the plaintiff was not entitled to the legacy of £1000. and to the estate at *Barrisaul,* but that he ought to be put to his election.

It appeared, by evidence taken under a commission in *India,* that the lands in question were held by instruments of grants called *Pottahs,* by which a perpetual right of occupancy was given to the grantee, subject to the payment of certain annual fixed rents, and to forfeiture in case of non-payment ; that the estate was descendable to heirs, and might be alienated, sold, or disposed of by the grantee.

These lands were held under a *Zemindar*, to whom the rent was payable, and who held immediately under the Government by a similar tenure.

By the decree made at the hearing by the late Master of the Rolls, on the 17th *December* 1817, it was referred to the Master, to inquire what was the nature of the interest which the testator, *Andrew Gardiner*, possessed in the *Barrisaul* estate, under the respective *pottahs* proved in the cause, and also whether the said *Barrisaul* estate or any and what part or parts thereof, passed by the Will of the said testator, attested by only two witnesses.

The Master, by his report dated 4th *August* 1818, certified that upon consideration of the translation of the *pottahs*, and some affidavits (two of which were made by gentlemen who had at different times held the office of Advocate-General at *Calcutta*), he was of opinion that the interest which the testator possessed in the *Barrisaul* estate. was of the nature of fee-simple, and that no part thereof passed by his Will, attested by two witnesses only.

The report had been confirmed, and the cause now came on to be heard, on further directions.

Mr. *Benyon* and Mr. *Richards* for the plaintiff :

The Master having found that this estate did not pass by the Will, the plaintiff, as heir-at-law, must be entitled to it. The question of election raised by the answer, cannot be sustained ; it is established, that a Will not duly attested, is not sufficient to put an heir-at-law to his election—*Sheldon* v. *Goodrick*, 8 Ves. 481, 497 ; *Boodie* v. *Barry*, 2 Ves. and B. 127.

Mr. *Horne*, and Mr. *Abercomby*, for defendant :

The rights which Europeans acquire in property purchased in the *East Indies*, are subject to great doubt. The question is one of the greatest importance ; it has always been the policy of our government to prevent emigration to that country ; no one is allowed to go there without a license ; and can English subjects, who are not permitted to colonize, acquire Indian property, which is to come descendable to their English heirs?

The Master's report is very short, and by no means satisfactory. The estate is found to be of the nature of a fee-simple ; but does it follow, that it is to descend to the person who is the heir according to our law? It may be a question whether it can descend to any European. The Court is altogether ignorant of the rules of descent that may prevail in *Bengal* ; what those rules are, is a question not of English law, but of fact, and some inquiry should be made ; so

1819.
Gardiner v. *Fell.*

much doubt exists upon the subject, that in a cause now pending before the Lord Chancellor, a commission has been despatched to *India*, to ascertain this very point.

We do not dispute the doctrine that an unattested Will cannot put an heir to his election; it is a void Will; the Court cannot look at it, even to ascertain the testator's intention, upon this technical ground, that the statute has declared such Wills to be null and void, to all intents and purposes. But it does not follow that the same is true with regard to an Indian Will not duly attested; here such an instrument is altogether nugatory, but there, though it cannot disinherit the heir, yet it may, as far as we know, be of sufficient force to raise an election. But even suppose that this is to be construed as an English Will, it will be admitted that if there be a Will of personalty, executed as such, and a legacy be given to the heir, on condition of renouncing the estate, he shall be put to his election, and it must be the same when such a condition is not contained in express terms, if the Will be framed in language from which it must be inferred. That is the case here; the gift of the estate, and of the £1000. are contained in the same sentence, and to disjoin them, would destroy the sense of the passage. It must be considered as an implied condition, that if he accepts the legacy, he is to take the estate as from the bounty of the testatrix, and not to claim, under an adverse title, the rents that she has received.

Mr. *Benyon*, in reply:

The objection to the plaintiff's title as heir was never raised before. The point could not have escaped Sir *W. Grant*, and the defendants, if there had been any doubt upon it, might have had it included in the reference. There is nothing more in this case to raise a condition against the heir, then in the others that have been decided in his favour; it can make no difference whether the legacy and the estate be given in two sentences, or in the same.

The Master of the Rolls (Sir *Thomas Plumer*):

This is a bill filed by an infant, claiming a legacy of £1000., and also an account of the rents and profits of these premises, as a debt from the estate of Mrs. *Euphemia Gardiner*, due to him in respect of his right to the property in question. The first point is, whether the is entitled to the estate? It was the property of a gentleman, who by Will gave it to his mother, and she afterwards disposed of it to the plaintiff. The claim was made upon the ground that both these dispositions were void, from not having been executed with the solemnities required by the statute, in devises of property in England.

1819.

Gardiner v. *Fell.*

The defendants, resisted this claim, and denied that a Will to pass such property required to be attested by three witnesses.

On the hearing of the cause, the late Master of the Rolls was of opinion, that as the question was one that related to property belonging to this country, it was a proper subject to be inquired into, by consulting those persons who were conversant with the laws of *India* ; for though the English laws prevail there to a certain degree, yet it was a matter of doubt, whether this particular statute should apply there. There have been many discussions as to how far, when English subjects have carried out our laws, and established courts of judicature in foreign countries, any particular laws should operate there ; there is great difficulty in fixing to what extent our law of real property, with its numerous refinements, chiefly derived from feudal ideas, not applicable to other countries, should attach to the foreign dominions of England. It was not, however, to ascertain this general question, that the inquiry was directed, but to find the nature of the testator's interest in this estate, and whether passed by his Will. If it had then been suggested that the property was subject to other questions that there were these points, so important with respect to public policy, to be settled, it would have been idle to send such an inquiry ; but undoubtedly, it was considered by the great Judge who directed it, to be the proper course, and I must take it that his decree was right, and that when the inquiry was answered, the object was attained.

Now the two questions that were sent to the Master, he has directly answered ; after taking the proper means by examining competent persons, he reports that the property was of the nature of fee-simple, and that it did not pass by the testator's Will.

It is objected that this report is defective, because though it states that the property did not pass by the Will, yet it is not said that it descends to the heir. With regard to this, if we look at the pleadings, we find that the plaintiff claims this estate as heir-at-law, and the answer contains a direct admission that he is heir-at-law. It must be inferred that this means heir *quoad hoc* ; and if the defendant had meant that the plaintiff was only heir-at-law to English property, and not to estates of this description, if any such objection had been raised, Sir *W. Grant* would not have confined the inquiry in the manner he has done, but would have added a direction to ascertain who was the person entitled. I think it may fairly be presumed, that the party did not intend to make an objection of this nature. It is quite clear that in the pleadings it was only meant to raise the question about the Will.

Next, to consider the true meaning of this report. The estate is said to be of the nature of fee-simple; that is, it possesses the qualities of a fee-simple estate; it must therefore have the quality of being descendable to the heir. How can it be of the nature of fee-simple, if it does not descend to the heir-at-law? It is an estate of inheritance; and if such, the rules and doctrine of estates of inheritance must be applied to it. All this must have been known and felt by the Judge who directed the inquiry; for otherwise his decree would have been defective.

The only other question is, that of election. And it must be allowed that this lady made her Will under the idea that the property was hers, and not supposing that any account of the rents would be called for retrospectively. If she had been told, the heir-at-law means to demand an account of what you have received from this estate, it is very probable that she would not have given him the £1000., or would have imposed a condition of releasing that claim; £1000., or would have imposed a condition upon conjecture. The question is, whether as the Will is framed, giving the £1000. together with the estate, it imparts that there must be any election or condition not to take both, and I think I should not be warranted in putting such a construction upon it.

It is admitted, that a Will attested by two witnesses only, is not sufficient to put the heir to his election. It might have been argued, that if you put a party to elect when the testator has given away the estate of another, the same should be done with regard to the heir, when the estate is thus devised. But it has been decided in several cases, that the Will cannot be looked at, and in those cases it might have been contended, and better than here, that there was an implied condition, not to take the bounty given by the Will, and at the same time dispute it. But if it be not so implied in general, what is there to distinguish this case? Indeed, it is stronger in favour of the heir, for the testatrix intended to give both; and why should the devise operate here, which it would not have done if it had been a devise to another person? It is not possible to confer a condition in the one place and not in the other. The words are not strong enough; if they had been, I should have been glad to lay hold of them, for the purpose of doing what I think the testatrix herself would have done. For it is probable, that if she had known of this claim, she would have qualified her gift. In the same way it may be said of any legacy to a debtor, when the testator was not aware of the debt, that if he had been, he would have imposed a condition of releasing; but the Court cannot infer such a condition upon conjecture only. There is not enough expressed in the Will to clothe the gift with any condition, and therefore I feel myself unable to decide against the heir. There must be an account of the rents and profits, but as it is a hard case, I shall not give costs.* Reg. Lib. 1818, A. (9.) fol. 1930.

1819.

Gardiner v. Fell.

In Chancery.

FREEMAN *v.* FAIRLIE.

Land tenures—Lands in Calcutta *held under Collector's* Pottah—*Nature of estate—Real property—British subjects holding lands—English law the law of settlement—Unattested Will, if can pass real estate—Collector's* Pottah *not a document of title.*

1828.

The tenure of land in *Calcutta* is of the nature of freehold, and real estate will not therefore pass by an unattested Will. The *Pottah* granted by the collector is not a muniment of title, but only an evidence of holding, according to a local and fiscal regulation.

HANNAH HAIGH, widow, formerly *Hannah Oldham,* widow, of *Calcutta,* in the *East Indies,* by her Will bearing date 15th *October* 1789, which was executed so as to pass real estates of inheritance, after giving certain legacies, devised and bequeathed all her estate to *Ann Freeman, Caroline Tranter,* afterwards *Caroline Jefcock, William Tranter, Burgess Tranter, Mary Butt,* and *Sarah Barnett,* and to their respective heirs, executors, administrators, and assigns, in equal shares and proportions, subject to the payment of her debts, legacies, and funeral expenses, and appointed the defendant, *William Fairlie,* then a banker and merchant at *Calcutta,* her executor.

The testatrix died some time in the year 1791, without having altered or revoked her Will, which was proved in the Supreme Court of *Calcutta* by the defendant *William Fairlie,* who entered upon, and took possession of, her real and personal estate.

At the time of her decease, the testatrix, besides considerable personal estate, was in possession of houses in the town of *Calcutta,* which were built by, and were formerly the property of, her deceased husband, *Samuel Oldham;* the ground whereon the same were built having been conveyed to him by indenture of lease and release of 18th and 20th of *August* 1780, and for which he had obtained, in 1782, from the Collector's office, a *Pottah.*

She was also in possession of a plot of ground in *Calcutta,* which had likewise belonged to her former husband, *Samuel Oldham,* and had been originally conveyed to him by an indenture, or deed poll of the 10th *January* 1785, and confirmed subsequently by indentures of lease and release, and for which he had also obtained a *Pottah* from the Collector's office.

Soon after his decease, his widow procured letters of administration of his estate and effects, to be granted to her, and in virtue thereof took possession of all his effects, both real and personal, including the houses and piece of land in question, and, having scheduled them in her accounts, procured three *Pottahs* to be granted to her of the whole premises.

---

* On the application of the laws of *England,* to her foreign possessions, vide *Calvin's* case, 7 Co. 34, 1 Blac. Com. §. 4. 108, 2 P. Will. 75; *Blankard* v. *Galdy,* Salk. 411; *Smith* v. *Brown,* ib. 666; *Hall* v. *Campbell,* Cowp. 204; *Spraggs* v. *Stone,* cited Doug. 38; *Rose* v. *Vaughan,* 4 Bur. 2500; *Ex parte Prosser,* 2 Bro. C. C. 325; *Evelyn* v. *Foster,* 8 Ves. 96; *Ex parte* Anderson, 6 Ves. 240; *Sheddon* v. *Goodrich,* 8 Ves. 481; *Attorney-General* v. *Stewart,* 2 Mer. 143. See also *Pike* v. *Hoare,* Amb. 428, and 2 Eden, 182, note.

The first *Pottah* so granted to *Hannah Oldham* was endorsed in English, "*Pottah* to *S. Oldham* for Bgs. 2. Sealed the 6th *July* 1789. O. T. H. (L. S.). A *Pottah* is hereby granted to *Hannah Haigh* administratrix of *Samuel Oldham*, deceased, for 2 bigahs of ground in *Dhee, Calcutta*, which formerly belonged unto Mr. *Samuel Oldham*,—rent 6 rupees sicca per annum. In the cutcherry of the *Calcutta* division, this 29th *June* 1789.

"No. 21, examined J. W. EDWARD COLEBROOKE, *Collector.*"

On the same slip of parchment which contained the above words and figures in English, was an instrument in the *Bengalee* language, a translation of which was in the following words and figures :—

"No. Twenty-one.

"To the benevolent Sir *Bebur Anna Haigh*, attorney to Mr. *Samuel Oldham*, the *Pottah* for land is granted. I grant you this *Pottah* for two bigahs of land formerly belonging to Mr. *Samuel Oldham*, in my talook *Mouza Pehu, Calcutta*, for you to dwell thereon, and you will pay the rent thereof, the annual sum of sicca 6 (six) rupees, in coin received in payment of rent, and dwelling thereon, free from interruption, hold possession of it : on these considerations I grant this *Pottah*. English year 1789, *eighty-nine*, 29th *June*, *Bengally* year 1196, *ninety-six*, 18 assar."

The two remaining *Pottahs* were of a similar form and description, being for the two other plots of ground, and were respectively numbered 22 and 23, and dated the 29th *June* 1789.

The testatrix possessed no other real estate, than that described in the above instruments.

In the year 1812, *William Fairlie* having quitted *India*, a suit was instituted in the Court of Chancery in *England*, by the legatees and devisees named in the Will of *Hannah Haigh*, against him for an account of the real and personal estate of the testatrix, and the administration thereof : to which His Majesty's Attorney-General and the East India Company were afterwards made parties, and on the 30th *November* 1815, a decree for the several accounts was taken, and a reference directed to the Master, to inquire into the nature of the tenure of the houses and land at *Calcutta ;* and in case he should be of opinion that the same were freehold, or in the nature of freehold estate, then he was to inquire and state, who was the heir-at-law of *Samuel Oldham*.

The Master (*J. Stephen*) made his report on the 6th *November* 1823,

1828.

Freeman v. *Fairlie.*

wherein he certified that the plaintiffs contended—1st, That land and houses in *Bengal,* held by British subjects, were chattels real, and not freehold estate. 2nd, That the lands and houses of which the testatrix was in possession at the time of her death, were situate in *Calcutta,* and held by *Pottah.* 3rd, That land and houses situate in *Calcutta,* and holden by *Pottah,* could not be of freehold tenure, as well because the *Pottah* is insufficient to pass a freehold interest, as because the East India Company, having only a temporary interest in the province of *Bengal,* cannot, by any instrument, grant a larger estate. And 4th, That although the custom of the province was, that the Company does not resume land held by *Pottah,* the tenure of such land is, notwithstanding, a tenure, at the will of the Company, according to the custom of the province, and that by such custom, the land is transmissible as personal, and not as freehold, estate ; and the plaintiffs therefore charged and submitted, that the testatrix was, at the respective times of making her Will, and at her death, under and by virtue of the aforesaid *Pottahs* or grants to her, possessed of, and entitled to, the before-mentioned three lots or parcels of land and houses in *Calcutta,* and that she had been so possessed, from the 30th of *November* 1788 (the day of the death of her husband, the late *Samuel Oldham*), or from the 29th day of *June* 1789, the date of the *Pottahs* granted to her as aforesaid, to the 1st *June* 1791, the day of her death ; and that the testatrix being so possessed, and entitled, to the same, or her beneficial interest in one moiety thereof, as widow of the said *Samuel Oldham,* passed by her Will, or by virtue thereof, became vested in the defendant, *William Fairlie,* as her acting executor, and that being held by *Pottahs* or grants, the tenure thereof was, and ought to be considered, as of the nature of chattels real, or personal estate ; or else as a customary tenure by *Pottah,* the custom whereof is, that on the death of a person possessed of lands and houses held thereby, the same, with a right to have a new *Pottah* thereof granted, pass to, and vest in, his executors, and administrators, to be administered as personal estate.

That the defendant, *Thomas Oldham* (to whom administration of the estate of *Samuel Oldham* in England, had been committed by the Prerogative Court of *Canterbury*), had also submitted to him certain reasons for considering the said lots or pieces of ground and houses, to be, by the law of the place, or by the law of England, as in force there, not real, but personal estate. That, on the other hand, the defendant, *William Fairlie,* had submitted that *Samuel Oldham,* the intestate, took, by the conveyances, and had an estate of inheritance in fee-simple of, and in all the said premises, and that

1828.

Freeman v. *Fairlie.*

the same (subject to such of his debts, if any, as his personal estate was insufficient to pay) descended to his heir-at-law, and did not pass by the Will or codicil of his widow, *Hannah Haigh ;* and that the premises were freehold, or of the nature of freehold estate, and the same conclusions of law have also been contended on behalf of His Majesty's Attorney-General ; and the Master certified, that, in support of the state of facts of the defendant *William Fairlie,* there had been produced and read before him, without objection on either side, affidavits of *Edward B. Lewin* and *Robert Percy Smith,* and the depositions taken on interrogatories of the Right Hon. Sir *Henry Russell,* Knt., and Sir *William Burroughs,* Knt., both late Judges of the Supreme Court at *Calcutta,* on the part of the defendant *William Fairlie,* and cross-examined on the part of the plaintiffs : and he was of opinion, upon the concurrent testimony of the witnesses, Sir *Henry Russell, Sir William Burroughs, Edward B. Lewin,* and *Robert Percy Smith,* that it was sufficiently proved and established, that the lots or pieces of land and houses, were of the nature of freehold estate, and did not pass by the Will of the testatrix; and therefore, he proceeded to inquire who was the heir-at-law of the intestate, *Samuel Oldham.* The Master then proceeded to state, that in consequence of the parties having obtained an order for a commission to examine witnesses in *India,* he had suspended further proceedings until such commission had been returned ; that witnesses having been so examined, their depositions were returned, and had been read before him; and he certified that the further evidence, after full consideration thereof, and hearing counsel and solicitors for the respective parties thereon, had not altered his first conclusion. And he had, therefore, proceeded with his inquiry as to the heir-at-law ; that the further evidence was not uniform in its effect, as to what the law of the East India Company's settlements in *Bengal,* relative to the subjects in reference, really was, but contained very opposite opinions, and showed that a difference in judgment subsisted between the Judges of the Supreme Court of Judicature at *Calcutta,* two of them, *viz.,* Sir *Edward Hyde East,* the Chief Justice, and Sir *Anthony Buller,* Justice, holding that lands and houses in *Calcutta* were real estates of inheritance, when conveyed ; while the third Judge of the same Court (there being three only resident there at that time), *viz.,* Sir *Francis Macnaughton,* held that all lands and houses there, in the hands of British subjects, were personal estate, or chattels real. That, considering the great singularity and importance of the difference in opinion between the highest local authorities, affecting, as was alleged, the titles to property of an immense amount in value, and finding himself unable,

1828.

Freeman
v.
Fairlie.

in forming a judgment on the points referred to him, to adopt entirely, either of the opinions upon the grounds assigned for them, but constrained to dissent from the reasons assigned by the majority of the learned Judges, while he adopted their general conclusion, he deemed it his duty to submit to the consideration of the Court, the grounds upon which those conflicting opinions were respectively maintained, and those upon which he had formed his own conclusions on the points in reference before him. He then proceeded to state, that it appeared clearly from the evidence, that land and houses in *Calcutta*, whatever their tenure, or the nature of the estate in them, which an absolute proprietor possesses, are liable to be sold under executions at law, obtained against him in his lifetime; that they are chargeable with his simple contract, as well as specialty debts, at his decease, and may not only be sold for satisfaction thereof, under execution against his executors and administrators, without joining the devisee, or heir-at-law, but that an executor or administrator, may sell them for that purpose, by his own voluntary act; and that a conveyance by him, without the concurrence of the heir or devisee, will give a good title to the purchaser. The question between the parties, and between the learned Judges, is, to whom does such property, if not wanted for the satisfaction of debts, or the surplus of the proceeds thereof, after payment of the debts, if sold for that purpose, devolve or belong? In other words, are lands and houses in *Calcutta* (subject to those admitted liabilities) to be regarded as real, or as personal estates? There is no written law expressly touching this question, or declaring what are the tenures of lands or tenements held by British subjects under grants from the East India Company, or otherwise, in *Bengal*; neither is there any written law by which the admitted liabilities of such property, to be sold for satisfaction of the simple contract or other debts of a deceased owner, and to be sold by his executors or administrators for that purpose, by their voluntary conveyance, were expressly created. The letters patent of *March* 26th, 1774, commonly called the Charter of Justice, whereby the Supreme Court of Judicature at *Calcutta* was constituted, pursuant to the statute, 13 *Geo.* III, c. 63, expressly made the lands and houses of British subjects, against whom executions are awarded by that Court, liable to be seized and sold; but the liability of the same property to be sold, in suits against executors or administrators, or by their voluntary conveyance, for the payment of the debts of their testators or intestates, is not created by any express words; it has, however, been held by the Court, and is now held by the two learned Judges thereof, who regarded such property as real estate, that these liabilities arise by implication and necessary construction of the same charter or letters patent; and upon this they solely rely, to reconcile such powers of the personal representatives, with their opinion that the property is real, and in all other respects governed as such, by the English law. Sir *Francis Macnaughton,* on the other hand, strongly denies that construction to be either necessary or right; and while he maintains that all lands and houses in *Calcutta* are personal estate, and that no fee-simple or freehold estates is, or can be held by British subjects there, he relies much for confirmation of that opinion, on the unsoundness of the construction of the charter, and the inability of his opponents, to show any other legitimate origin of the admitted liabilities of the land, and the power of the personal representation, supposing property the subject of them, to be real estate of inheritance. The arguments of the learned Judges respectively, in support of these conflicting opinions, were stated at very great length in the evidence transmitted by the commissioners from *India,* which comprises, among other things, reports, certified by them to be correct, of their respective arguments in the Supreme Court on giving their judgments *seriatim* in a cause between *Jacob Joseph,* plaintiff, and *Rowland Ronald,* defendant, decided in that Court on the 27th day of *March* 1818. Mr. Justice *Macnaughton,* having been examined as a witness, under the commission, referred to a printed report of his argument on that occasion, deposed to by him as an exhibit, and stated in his evidence that he still adhered to his opinion as therein reported, and believed it to be correct. The Chief Justice and Sir *Anthony Buller,* Justice, declined to be examined as witnesses within their local jurisdiction, as to the law administered by them, but signed a certificate, referring to a manuscript report of their arguments, delivered from the Bench in the cause of *Joseph* v. *Ronald,* which was also made an exhibit under the commission, and deposed to by a witness, proving their signatures to the certificate, and they have thereby certified the accuracy of the report, and their adherences to the opinions as therein contained. They have included also, in the exhibits a report of a former cause, decided in the same Court in 1785, in which *Doe,* on the demise of *Savage,* administrator, with the Will annexed of *Whiffin,* was plaintiff in ejectment, and *Brancharam Tagore,* defendant, in which it was decided unanimously by the Judges who then presided, *viz.,* Sir *Robert Chambers,* Mr. Justice *Hyde,* and Sir *William Jones,* that land in *Calcutta* did not pass by a Will not attested by three witnesses, pursuant to the Statute of Frauds, because it was fee-simple estate; and all the same present Judges, have referred to the opinions of the former Judges as thereby reported, the Chief Justice *East* and Mr. Justice *Buller,* for the purpose of confirming, and Mr. Justice *Macnaughton,* for that of com-

1828.

Freemna v. *Fairlie.*

menting upon and dissenting from the same, as so reported. That he did not think it necessary or proper to set forth at large the several judicial arguments in that, his report; but referring generally to them, as contained in the exhibits, he thought it sufficient to state their general effect: and first, as to that, upon which the difference between the learned Judges principally turns the construction of the charter of 1774. The words of that instrument, so far as material to the construction, are as follows. In the clause descriptive of the actions or suits in which, and the persons against whom, jurisdiction is given to the Supreme Court of Judicature, the words are—"All "actions and suits which shall or may arise, happen, be brought or "promoted, upon, or concerning any trespasses or inquiries of what "nature or kind soever, or any rights, titles, claims, or demands of, "in, or to any houses, lands, or other things, real or personal, in "the several provinces or districts called *Bengal, Bahar*, and *Orissa*, "or touching the possession, or any interest or lieu, in or upon the "same; and all pleas, real, personal, or mixed, the causes of which "shall, or may arise, accrue, or grow, or shall have heretofore arisen, "accrued, or grown, against the united company of merchants "trading to the *East Indies*, and against the said mayor and aldermen of *Calcutta*, and against any other of our subjects who shall be "resident within the provinces, districts, or countries, called *Bengal*, "*Bahar*, and *Orissa*, or who shall have resided there, or who shall "have any debts, effects, or estate, real or personal, within the same, "and against the executors or administrators of such our subjects, "and against any other person who shall at the time of such action, "brought, or accrued, &c., have been in the service of the company." And in the subsequent clause, directory as to process of executions or judgments obtained, the writ of execution is directed to be issued to the sheriff, "Commanding him to seize and deliver the possession of "houses, lands, or other things recovered in, and by such judgment, "or to levy any sum of money which shall be so recovered, or any "costs which shall be so awarded, as the case may require, by "seizing and selling so much of the houses, lands, debts, or other "effects, real and personal, of the party against whom such writ "shall be awarded, as will be sufficient to answer and satisfy the said "judgment or award, or to take and imprison the body of such party, "&c." On these words it has been, in the first place, argued, that this charter, and the Acts of Parliament authorising and confirming it, must have intended that real actions, as well as personal, might be brought against executors and administrators, and that houses and lands might be recovered and sold in suits against them, because these personal representatives are named, and heirs and devisees are

1828.

Freeman v. *Fairlie.*

not, and yet by the previous descriptions of the suits and subsequent directions as to levies, real estates were to be recovered and sold; but this construction seems to stand on the assumption, that every particular designation of the persons, against whom the jurisdiction may be exercised, must of necessity have its proper correlative term, not in one only, or more, but in every particular action or causes of action before enumerated, to which I cannot subscribe. "Were it so (continues the Master), an executor or administrator in *Calcutta,* I conceive, would be liable, by the same rule, to an action of trespass *vi et armis* for every assault, or other forcible injury committed by his testator or intestate, as well as to a real action or ejectment for his lands; and as to the execution clause, the same mode of construction might prove, that an executor takes his testator's fee-simple estate to his own use, or that he is liable to answer his testator's debts out of his own real estate, for he is the party against whom the execution is to be awarded; and the person, therefore, whose houses and lands, according to the words, if applied strictly to all debts, are to be sold. It is further argued, that the heir not being named as such in the enumeration, there would be no remedy against him by the creditors; but it seems to me a sufficient answer, that he would be within the other personal description; for if the lands or houses descended as real estate on him, he would himself be a person having real estate within the province, and the claim of his ancestors' creditors would, in the very words of the charter, be a claim or demand of, in, or to the same, or of an interest in, or lien upon, the same. The case of an heir would both ways, therefore, as I conceive, be clearly within the provisions of the charter. Some of the learned persons who have supported this construction, and among them Sir *William Jones* in the said case of *Doe, dem. Savage* v. *Brancharam,* have further thought that the clauses, which relate to the grant of probates and administrations tend to confirm it, the Supreme Court being empowered thereby to commit administration of goods, chattels, credits, and all other effects whatsoever of British subjects dying within the province; because the word 'effects,' is large enough to comprise real estate (a proposition which Sir *Francis Macnaughton,* in opposing this construction of the charter, controverts, but which I apprehend is true), it has been argued that it should be construed here to bear that meaning; but I humbly conceive that if the framers of the charters, had been meditating so important an innovation on the existing law of real property, as is supposed, they would have chosen a term more clearly appropriate to, or descriptive of, their purpose. It may seem superfluous to add, that this very clause furnishes an argument on the other side; for, in making real property in *Bengal* executorial assets, it would have been strange to limit the power of committing administration of it, to the cases of British testators or intestates dying in that country, since such property could not be considered as within the jurisdiction of our own Ecclesiastical Courts. Inadmissible though these constructions appear to be, they are not more so, however, than that which refers to the same charter, and to the same clauses of it, for the origin of the power of executors or administrators to sell and convey the real estate, without the concurrence of the devisee or heir-at-law. The late Sir *Robert Chambers* is reported to have said, in giving his judgment in *Doe, dem. Savage* v. *Brancharam*, 'The necessary consequence of these provisions (the clauses of the charter before stated) is, that though such land be real property, it must, like a personal chattel, go to the executor or administrator in the first instance, who has the same power of disposing of it by sale, that he has of personal chattel, and for the same reason, because he is bound, in the first place, to pay the debts and funeral charges, and afterwards to be considered as a trustee for those who are entitled to the residue.' The learned Judge afterwards noticed an objection: 'It was said, that those who had purchased from executors, would be in danger of having suits commenced against them by heirs or other claimants; but the charter (he observed) having subjected lands in the hands of the executors in the same manner as chattels, to be sold for payment of debts, he who was *bona fide*, and for a valuable consideration, purchased a piece of ground from an executor, is as secure in his possession, as if he had purchased a ship. Those entitled to the produce of either the one or the other, must make their claims on the executor or administrator, and not upon the purchaser.' Sir *Edw. Hyde East* and Sir *Anthony Buller* have, in their judgment in *Joseph* v. *Ronald*, adopted this further construction of the charter; though, as it appears to me, not with perfect satisfaction to themselves, or firmness of opinion. 'Real property (observed the former) is nowhere in terms made assets generally; and it is only by construction and implication, though I think the construction and implication are reasonable and necessary, that it is made assets for payment of debts and satisfaction of claims and demands upon it in the hands of executors and administrators. The express power given to seize and sell, is only given to the Court, after judgment and writ of execution to the sheriff, against the original debtor, or his executors or administrators; but it is a reasonable construction of such a power, that where an executor or administrator has no reason to dispute the justice of the claim or demand upon the deceased's estate, he should not drive the creditor to the expense of a suit, but should, by his own act, dispose of the real as well as the personal property, for the satisfaction of the debt, or demand, which would otherwise be enforced against him by suit. It must be remembered, however, (he observed,) that the power is only expressly given, even to the Court itself, for the satisfaction of debts or claims upon the property, and therefore the primary and direct implication, raising a power of sale in the executor or administrator, without the intervention of the Court, would seem to confine the execution of the power, (if it were to be considered as a bare power,) to the same purposes, namely, the satisfaction of debts or claims upon the property, and require therefore proof of the existence of such debts or claims, in order to support the private conveyance by the executor or administrator.' The learned Chief Justice then noticed that this latter point was not necessary to be decided in the cause before him, but added, 'Upon the best consideration, however, which I have been able to give to the general question, I am disposed, as at present advised, to carry the implication one step further, upon the authority of the case, *Doe, dem. Savage* v. *Brancharam*, and to say, that the charter did not mean to give only a bare power to executors and administrators, to take and sell the real property for the payment of debts, and to answer demands upon it, but that it meant to give them an interest in it, in the character of what I may call charter trustees, for the benefit, indeed, primarily of creditors (if any such there were), but generally for the benefit of those, to whom the law of England would give it, or for whom that law makes it liable, with the difference only, that by the law of England it would have been only answerable for judgment, and specialty debts in the hands of the heir, and subject to dower; whereas, by the British law of *India*, it is made liable, in the first instance, for all kinds of debts and demands in the hands of executors and administrators, as it was also made liable for them in the hands of testators or intestates, and after those debts and demands are satisfied, they must hold it for the benefit of the heirs, (subject to the dower of the widow if it remained in kind, or if the surplus value only of it in money remained in their hands, subject to her equitable claim for her proportion,) because it is not purposed to be given to any other person or persons, or for any other purpose than for the payment of debts, or satisfaction of claims upon the property itself.' The learned Chief Justice, after giving further reasons at great length in support of this widest construction of the charter, concluded with adding,—'It is, however, much to be regretted, that the lawgiver has not spoken in plainer terms upon a matter of such

1828.

Freeman v. *Fairlie.*

general and extensive consequence, but has left this conclusion to be sifted by construction and accumulated implications, which make me tremble while I am making them, though I have a former decision of this Court to guide me to the conclusion.' Sir *Anthony Buller*, in his certified opinion or argument in the same cause, agreed generally with this construction in all points, though he admitted that the words were of very doubtful meaning, and relied chiefly on the former decision; and Sir *Henry Russell*, and Sir *William Burroughs*, with almost all the other witnesses, who concur with them on the main question, either expressly or virtually construe the charter in the same extensive way, referring to its provisions alone the powers of executors and administrators over real estate, as well as its general liability to debts; but with all the deference to such high authorities on Indian law, he could not satisfactorily adopt these constructions of the charter, as the ground of his conclusions in regard to the rules of law in question, but felt himself bound expressly to dissent from them in the opinion, which he had humbly to submit to the Court. That it seemed to him, that these 'accumulated implications,' as they are rightly called by the Chief Justice, were still less admissible than the first implication, from which they are supposed to flow: and that if a liability to be sold by execution, against executors or administrators, had been clearly created by the charter, it still would not follow that those personal representatives were also empowered by it, to sell by their own voluntary conveyances, without the concurrence of devisees or heirs-at-law, and so as to make, independently of the existence of debts, as well as of the application of the purchase-money, a good title to the purchaser. Some of the learned Judges who maintain these wide implications, support their opinions by a supposed analogy to the law of the British West India and American colonies. The Chief Justice in his argument observed, that if his construction of the charter was right, it would not be found to be an anomalous case, for that a provision of the same nature was made by the statute 5 *Geo.* II, c. vii, s. 4, for all the British plantations and colonies in *America*, and he cited the words of the section, which are, 'That the houses, lands, negroes, and other hereditaments and real estates, in any of the said plantations, belonging to any person indebted, shall be liable to, and chargeable with all just debts, duties, and demands, of what nature or kind soever, owing by any such person to His Majesty, or any of his subjects, and shall and may be, assets for the satisfaction thereof, in like manner as real estates are, by the law of *England*, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process in any Court of law or equity, in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively, are seized, extended, sold, or disposed of, for the satisfaction of debts.' The learned Chief Justice then cited Mr. *Toller's* Law of Executors, for the proposition that an estate in fee in the plantations, is subject to debts, and esteemed as a chattel till the creditors are satisfied, when the lands shall descend to the heir. This, however, he remarks, was first applied to the laws of *Barbadoes*, in *Blanchard* v. *Goedy*, 4 Modern, 226, which was in the 5 *William* and *Mary ;* but it may be considered, he adds, as a clue to the more general statute. The learned Judge here seems to suppose, that the statute 5 *Geo.* II. c. 7. has introduced into those colonies generally, a practice similar to that which prevails in *Bengal*, and which he ascribes to the charter of 1774 : and Sir *Anthony Buller*, in concurring with that construction, and especially as to the power of an executor or administrator, to see the real estate, says, 'I believe it accords very much with the mode in which real estate is applied in the colonies, under the statute 5 *Geo.* II.' But the learned Judges were evidently misinformed on this head ; and I am enabled, from having long practised at the Bar in several West Indian colonies, to state, and therefore deem it right here to state to the Court :—That in none of our West India colonies, nor, as I have reason to believe, in any British colony in *America*, was it held, either before or since the statute 5 *Geo.* II. c. 7, that executors or administrators, could sell the real estates of their testator or intestates, by their own voluntary act and conveyance, even for the necessary satisfaction of his debts ; and yet, in several of those colonies, real estates are sold by execution on judgments obtained against the executors or administrators, without joining the devisees, or heir-at-law ; instead therefore of the law of the American colonies supporting by analogy the construction in question, it makes against that construction, by showing that there is no such clear practical necessity as is assumed, for giving to the personal representatives, by implication, a power of acting, selling, real estate for payment of debts, even where it may lawfully be sold for the same purpose by adverse process in suits to which they alone are defendants ; the same may be said even as to the supposed implication in the charter, that the real estate may be recovered or sold by execution against the executors or administrators of the debtor. It

1828.
Freeman v. *Fairlie.*

receives no countenance from, but is rather opposed by, the law or practice of our American colonies, under the statute 5 *Geo.* II, c. 7. Though the language of that Act is rather ambiguous, the most material and consistent construction of it seems to be, that in making real estates assets for simple contract debts, no charge was intended as to the manner in which, or the persons against whom, such assets might be recovered after the death of the debtor, but that the simple contract creditor, was left to proceed in the same way that bond or specialty creditors might be, as in this country, and that the clause as to selling by execution, had reference only to actions against the debtor himself in his lifetime. The fact is, that the statute 5 *Geo.* II, c. 7, was in few, if in any, of the British colonies, introductory of a new rule, as to the liability of real estates to debts, either in respect of their being sold by execution, or being chargeable with debts by simple contract. In the *West Indies*, they were liable to be sold and charged by the practice of the Colonial Courts, at least as far back as any extant records, or the memorials of that practice extend; and the notice of the law of *Barbadoes* in *Blanchard* v. *Goedy*, might have been extended to every one of the then British *Leward Islands*. But these departures from English law of real property, do not appear to have arisen from any positive law. Acts of Assembly are extant, directory as to the forms of executions, and proceedings under them, by which the order wherein the lands and tenements shall be levied upon, and the manner of selling and conveying them, are regulated, and several of these Acts are prior to the 5 *Geo.* II, c. 7; but not one of them enacts these liabilities of real estates, in any way that marks the introduction of a rule substantially new. There is reason therefore to conclude, that the practice is coeval with the first settlement, or acquisition of the colonies, or the first establishment therein of any courts of justice, and that it was tacitly adopted as a departure from, or modification of, the law of the mother-country, rendered highly expedient or necessary by the local circumstances in which they were placed. In the British settlements in *North America*, the same practice seems to have obtained, and probably in the same manner. But a short time prior to the 5 *Geo.* II, c. 7, the Assemblies or Courts of some of our North American colonies, are said to have attempted to exempt their lands from this liability to simple contract debts, and that of being sold under executions, in order that they might better be able to fence with, or defraud their creditors in the mother-country; and this attempt, probably, gave occasion to the Act of 5 *Geo.* II, c. 7, for the protection of the British merchants and others, to whom the colonists were largely indebted. The statute, therefore, seems to have had rather a declaratory, than

1828.
Freeman
v.
Fairlie.

enactive effect, except that by placing the existing practice substantially every where on the new basis of parliamentary legislation, the Assemblies, as well as the Courts of the colonies, were precluded from the power of subverting it to the prejudice of the English creditors. But as to the manner in which real estates were to be brought to sale, either in the debtor's lifetime, or after his decease, the statute did not expressly repeal or alter any colonial law or practice, by which the same ends had already been provided for and attained, nor have its general words of reference to the law of England, as to specialty debts, and to the laws of the respective plantations, as to personal estate taken in execution, ever been construed to imply any such alteration or repeal. If they had, the remedies of the creditors would in most colonies have been obstructed or impaired, instead of being protected or advanced. But in no British American colony, or none of those in the *West Indies* at least, has any such construction had place ; and the consequence is, that, in each respective colony, British at the time of that Act, its own antecedent practice has been pursued, except when varied by subsequent Acts of Assembly ; though in no one colony are the real assets of a deceased debtor recovered or discharged in like manner, as for satisfaction of bond, or specialty debts in *England*, and no where are the debtors' lands levied on and sold under execution, in like manner with the present estate, so levied on and sold under the law of the same colony ; much less has it any where been held, that real estate can be sold or disposed of by executors or administrators under the Act, by their own authority, which the learned Judges of the Supreme Court all seem to have understood, as the clear import of the words, 'shall be sold or disposed of in like manner as personal estate,' and which they accordingly supposed to be the practice in all our American colonies; unless, indeed, that clause of the Act is referred to remedies only against the debtor in his lifetime, and the former clause only to remedies against his assets after his death, the section would be at variance with itself ; for the remedy obviously could not be at once the same, with that for bond or specialty debts in *England*, and with that for the sale or disposition of chattels in the colonies. But the executors and administrators have, in none of the colonies, been considered as having power to sell the real estates of their testators or intestates; such estates are, in several of our West India islands, sold under judgments and executions, obtained against executors and administrators only ; while in other islands, the devisees, or heirs-at-law, are joined as co-defendants with the personal representatives in the suit, and in the process for that purpose. Though I deem it my duty thus to point out to the

1828.

Freeman v. *Fairlie.*

Court, the unsoundness of the supposed analogy in the law and practice of the British American colonies, which is relied upon by the learned East India Judges, in their judicial opinions, in evidence before me, as being contrary, in point of fact, to what I know of the law and practice of those colonies; it is not, on this ground alone, that I feel myself bound to dissent from the reasons on which they rely, and humbly to state, as my opinion, that the construction put, by the said majority of the learned Judges, on the words of the charter, cannot be sustained; and that Mr. Justice *Macnaughton's* dissent therefrom, is well founded. But, nevertheless, it does not seem to me, necessarily to follow, that the practice of selling the lands and houses of British subjects, in *Calcutta*, under executions, obtained against them, or against their executors or administrators, or even the sale thereof, by the voluntary act of those personal representatives, is contrary to law; still less, that to reconcile such practice with law, all the lands and tenements in *Bengal*, must be regarded as personal estate; indeed, it appears to me, that this latter consequence, though maintained by Sir *Francis Macnaughton*, in his construction of the charter, is utterly irreconcileable with the words of that instrument itself, which expressly describes real actions, and directs the sale by execution, of real, as well as personal property; for the explanations attempted by that learned Judge, to wit, the supposing that chattels real, and ejectments for the recovery of them, only were intended, seems to me quite unsatisfactory, and such as cannot, without assigning an incorrect, as well as forced, and unnatural sense to the language, be received. But, though all the learned Judges seem to have agreed, in regarding the charters of 1774 as the only legitimate source of the practice in question, that can be assigned, if extended to fee simple, or real estates, (as it clearly must be, if there are any such estates held by British subjects, within the jurisdiction of the Supreme Court of Judicature,) the main principles on which this opinion is founded, appear to me very disputable, if not clearly, incorrect, and such, as if generally adopted, in relation to the colonial dependencies, and settlements of Great Britain, would lead to very alarming and dangerous consequences. These principles seem to be, that, where the law of England is introduced, into a newly acquired colony, or settlement, that law must universally give the rule, in all cases, not otherwise provided for, by express legislation, and that no local custom, or practice, though coeval with the possession of the colony, or settlement, even if it were derived from a law previously established there, can be lawful, if repugnant to, or a departure from, the maxims of English law. 'The lands of Mahomedans and Hindoos, (said Sir *Robert*

Chambers, in *Doe, dem. Savage* v. *Brancharam*, as appears by the certified report,) descend, according to their own respective laws, and by a subsequent statute, every question of inheritance, and succession, is to be determined in their cases, by those laws. The case of lands, in the hands of British subjects, (he added,) is different. The common law of England, and the greater part of our statute law, having been introduced here, by several royal charters, and particularly by the charter establishing this Court, lands of British subjects, must descend, as they do in England, except so far as the descent is interrupted, or the succession thereto, varied by the clauses in the charter, that respect suits against executors and administrators.' In the same view, the learned Chief Justice *East*, in his certified opinion, in *Joseph* v. *Ronald*, rests the question throughout, on the construction of those clauses in the charter, and Mr. Justice *Buller* says,—'I fully concur with the Chief Justice, in thinking that lands must be considered, as descending, according to the English law, except so far as the charter may have altered that course of descent. By that, (he says,) as well as the former charters, the English law had been introduced, for the government of British subjects, part of which law, and which I consider as also introduced thereby, is, that land, in which the party has a permanent interest, should descend accordingly to a certain course of inheritance. If a new country, (he adds,) is discovered by British subjects, they carry with them the laws of inheritance, as included in the English law; and if the English law, attaches on a country already settled, where the inhabitants hold land of perpetual inheritance, such land, is by that law, deemed to be real property.' The arguments of Mr. Justice *Macnaughton*, on the other side, proceed on the same general views. 'The lands of Mahomedans and Hindoos, are, by a special Act of Parliament, (he observes,) to be dealt with according to their own laws; but the lands of all others, Armenians included, must go according to the English law, and not otherwise. If all the property (he adds) which is not specially excepted from it, shall not be regulated by the English law, no law will exist in this place, by which it can be regulated, or by which disputes that relate to it can ever be determined.' The first question, that naturally suggests itself, on these opinions, is how, and when, the English law was generally introduced. The learned Judges all refer its introduction, for the Government of British subjects, to the charter of 1774, and former charters, without further explanation, which would lead to the notion, that the English law, introduced by different portions, since the introduction of the whole code, is obviously an act, not susceptible of iteration, and therefore, must have been done, if at all, in

1828.

Freeman
v.
Fairlie.

that way, by a single charter, not by several; and in that case, it would be material, to ascertain by which of the number, the English law had been introduced, because from its date, subsequent Acts of Parliament would have no effect, without an express extension of their enactments to *India*: but on referring to printed copies of the charters granted to the East India Company, from the year 1601, to the charter of 26th *March* 1774, inclusively, and particularly examining the same, from the charter of *September* 24, 1726, inclusively, being the charter which provided for the administration of justice, in the Company's settlements, by establishing a Court, called the Mayor's Court; I find, in none of them, any express introduction of English law, but on the contrary, they seem all to have proceeded on the assumption, that English law was already in force in those settlements, and their provisions, are directed chiefly to the establishing competent judicial authorities, and rules of proceeding, by which the existing law, may be better administered, specifically ordaining therein, many departures from the practice of the Courts in *England*, and in other cases, referring generally to the jurisdiction and authority, and forms of proceedings, of those Courts and their officers, as what the new Indian Courts and officers were to conform to, as nearly as local circumstances would permit. The charter of *September* 24, 1726, establishing the Mayor's Court, recites in its preamble, that the East India Company, 'had, by a strict and equal distribution of justice, within the towns, forts, factories, and places, belonging to them in the East Indies, very much encouraged, not only his Majesty's subjects, but the subjects likewise of other princes, and the natives of the adjacent countries, to resort to, and settle in, the said towns, forts, factories, and places, &c., and that, there was great want in all the said places, of a proper and competent power and authority, for the more speedy, and effectual administering of justice, in civil causes, and for the trying and punishing of capital, and other criminal offences and misdemeanours, &c.' It seems plain, therefore, that some law, both civil and criminal, previously existed, and was in some manner administered there, which law, the charter intimates no intention of abrogating, but on the contrary, of better carrying the same into effect; and that this could be no other than the law of England, may be clearly inferred from many clauses in the charter, and especially from the power therein, given to the Governors, or President, and Council of *Madras*, *Bombay*, and *Fort William*, in *Bengal*, with the approbation of the Court of Directors, to make bye-laws for the government, not only of the Corporation, of the Mayor and Aldermen, thereby created at those settlements, but of the inhabitants in general, with a proviso,

1828.

Freeman v. *Fairlie.*

that such bye-laws, should not be contrary to the laws and statutes of *England*. The same observations apply to the charter of the 8th *January* 1753, whereby the Mayor's Courts were established, and their jurisdiction further regulated, and to the charter of *March* 26th, A.D. 1774, constituting the Supreme Court of Judicature, upon which, the questions in reference are held by the Court to turn. Though some of the opinions in evidence before me, speak of this latter charter, only as having introduced the law of *England*, no provision to that effect, is to be found in it, but it plainly proceeded, like the former charters, constituting the Mayor's Courts, upon the supposition that English law was already generally in force, and it made no alteration in the existing code, except by constituting a new Court of Judicature, which it endowed singly, with almost every jurisdiction, civil and criminal, legal and equitable, known to the law of *England*, and by regulating specially, its practice, in many cases. In all which points the law of *England*, was obviously departed from, or varied, rather than originally and generally introduced. I must conclude, therefore, that English law was not, as the learned Judges have supposed, brought in by the charters; nevertheless, that the law of *England*, subject to the exceptions in question, and to others introduced by the charters, ought in general to be, and practically is, the law by which British subjects are governed, and their rights determined, within the territories of the East India Company, in *Bengal*, is agreed on all hands, and has been virtually recognized by Parliament, not merely by Acts which authorised, and have confirmed the charters, but by an enactment in the statute, 21 *Geo.* III, c. 70, s. 17 and 19, the intent of which, can no otherwise be explained. By that statute, entitled, 'An Act to explain and amend so much of an Act, made in the 13th year of the reign of his present Majesty, entitled an Act for establishing certain regulations for the better management of the affairs of the East India Company, as well in *India* as in *Europe*, as relates to the administration of justice in *Bengal*,' &c., it is enacted, 'that the said Supreme Court shall have full power and authority to hear and determine, in such manner as is provided for that purpose by the said charter of 1774, all actions and suits against all and singular the inhabitants of the city of *Calcutta*, provided that the inheritance and succession to lands, rents, and goods, and all matters of contract, and dealing between party and party, shall be determined in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos; and where only one of the parties shall be a Mahomedan or Gentoo, by the law and usages of the defendant.' And it is thereby further enacted, 'That it shall be lawful for the said Supreme Court to frame such process, and make such rules and orders for the execution thereof, in suits, civil and criminal, against the natives of *Bengal, Bahar,* and *Orissa,* as may accommodate the same to the religion and manners of such natives, so far as the same may consist with the due execution of the laws and attainment of justice.' Though it is not here declared by what law the same questions shall be governed and determined, when the parties, inhabitants, are neither Mahomedans nor Gentoos, it seems plainly implied, that the legislature had some other laws and usages in view, which were applicable, and should be applied, to the cases of British subjects, and others inhabiting there; and these could be no other than the laws of *England,* modified by force of the charters, or other local institutions. But the difficulty, in consequence of which the witnesses and Judges of the Supreme Court are divided, still remains, namely, how to reconcile the general introduction and authority of English law with the power of executors and administrators to sell the lands and tenements of their testators or intestate, and, with such property, being assets, for the satisfaction of debts, of every degree, in their hands. If it is denied that lands and tenements are universally, there, chattels interests, which is the solution of Mr. Justice *Macnaughton,* and also that the charter of 1774 has subjected them, as real estate, to such power of the personal representatives, which is the solution of the other Judges, then the question is, from what legitimate source were such particular departures, from one general law of real property, actually derived? It appears to me, that a satisfactory solution of this difficulty may be found by referring the introduction of English law, in the East India Company's settlement in *Bengal,* to what I conceive to have been its real period, and its true source, and by ascribing to it such modifications as naturally arose from the peculiar circumstances of the case. The general rules, as to the law of countries newly settled, by British subjects, or acquired by the British Crown, are not fully adverted to by the learned Judges whose opinions are in evidence before me, and not, I conceive, accurately applied by them to the case of our Indian settlements. It is true, as remarked by Sir *Anthony Buller,* that if a new country is discovered and settled by British subjects, they carry with them the English law, but with this modification, unnoticed by the learned Judge, that is, so far only as that law is applicable to their local circumstances. *India,* however, is not, in the sense of authorities by which the rule has been laid down, a new-discovered country; and, with respect to colonies or settlements, acquired by cession or conquest, within the description our Indian territories are, the rule is

1828.

Freeman v. *Fairlie.*

different, the laws of the place, in such cases, remaining in force till changed by royal or parliamentary authority. But there is an anomaly in the case of the settlements in question, which made it difficult or impossible, as I conceive, practically to apply there the latter rule, to its full extent, and took the case out of the principles on which both those rules were founded. I apprehend the true general distinction to be, in effect, between countries in which there are not, and countries in which there are, at the time of their acquisition, any existing civil institutions and laws, it being, in the first of those cases, matter of necessity that the British settlers should use their native laws, as having no others to resort to; whereas, in the other case, there is an established *lex loci*, which it might be highly inconvenient all at once to abrogate; and, therefore, it remains till changed by the deliberate wisdom of the new legislative power. In the former case, also, there are not, but in the latter case there are, new subjects to be governed, ignorant of the English laws, and unprepared, perhaps, in civil and political character, to receive them. The reason why the rules are laid down in books of authority, with reference to the distinction between new-discovered countries, on the one hand, and ceded or conquered countries, on the other, may be found, I conceive, in the fact, that this distinction had always, or almost always, practically corresponded with that, between the absence and the existence of a *lex loci*, by which the British settlers might, without inconvenience, for a time, be governed; for the powers from whom we had wrested colonies by conquest, or had obtained them by treaties of cession, had ordinarily, if not always, been civilized and Christian States, whose institutions, therefore, were not wholly dissimilar to our own. But, in the settlements formed by the East India Company in *Bengal*, the case was very different, and one to which neither of the rules referred to could possibly have an entire application. The acquired territory was not newly discovered or inhabited, but well peopled, and by a civilized race, governed by long-established laws, to which they were much attached, and which it would have been highly inconvenient and dangerous immediately to change. On the other hand, those laws were so interwoven with, and dependent on, their religious institutions, as Mahomedans or Pagans, that a great part of them could not possibly be applied to the Government of a Christian people. Besides, there was, as appears from the Act of Parliament last mentioned, no uniform *lex loci* to regulate inheritance, successions, and other important subjects of legislation. But the two great classes of native inhabitants, Mahomedans and Gentoos, were governed, in such matter, by different laws, derived from their respective religious institutions. Some new course was to be taken in this peculiar case; and the course actually taken seems to have been, to treat the case, in a great measure, like that of a new-discovered country, for the government of the Company's servants, and other British or Christian settlers using the laws of the mother country, as far as they were capable of being applied for that purpose, and leaving the Mahomedan and Gentoo inhabitants to their own laws and customs, but with some particular exceptions that were called for by commercial policy, or the convenience of mutual intercourse, and between the British settler and the natives, and which are found quite reconcileable with differences of religious faith: such, for instance, as leaving the interest of money unlimited by law. It seems highly probable that the same general adherence to English law, and the same partial adoption of the existing laws and customs of the country, were applied to immoveable property, when acquired by British subjects, and produced the seemingly incongruous practice for which the Judges, at a period remote from its first introduction, have found it so difficult to account on legal grounds. If it be supposed that lands and tenements in *Bengal*, whether held by Mahomedans or Gentoos, were liable to be sold, in the owner's lifetime, by legal process, for his debts, and were liable as general assets, after his death, in the hands of those who had the administration of his personal estate for the satisfaction of his debts, of every degree, and might be sold by them for that purpose; it will be obvious that these were parts of the law of the country which there were strong reasons of commercial policy and convenience, and even justice, for adopting, in regard to the same species of property, when in the hands of British subjects. The learned Judges of the Supreme Court, amongst all their differences, have concurred in regarding these powers of the personal representatives in *India* as peculiarly expedient, or necessary, in the cases of British subjects, because it rarely happens that they have heirs of full age on the spot, or nearer to it than Europe, and the inconvenience, therefore, both to the creditors and heirs-at-law, would be great, if houses and land in *Calcutta*, chiefly bought for commercial purposes, could not be brought into administration, or sold, until the heirs-at-law could arrive, or constitute attorneys, with sufficient proofs of their pedigree, by evidence sent from this country, to satisfy a purchaser as to the title. It would also have been pregnant with very inequitable consequences, injurious to commercial credit, if in the dealings between British and native merchants, of which this very species of property might often be the subject, it had been liable, in the hands of the natives or their executors, to simple contract debts, but not so when bought by British subjects; an inequality the

1828.

Freeman v. *Fairlie.*

more unjust and inconvenient, because our bankrupt laws are never considered as extending to that country. The reason, therefore, for adopting these parts of the Indian law, if such they were, must have been felt to have been extremely strong, and were probably decisive; but, on the other hand, there was no sufficient reason for departing from the rules of English law, as to the inheritance of real estates; nor would it, I apprehend, have been an adoption of Indian law, but, on the contrary, a wider departure from it, to have made such property as distributable among the widow and next of kin, as personal estate; for, I understand the fact to be, and it partly appears, from the evidence before me, that the eldest son of a deceased landholder in *Bengal* succeeds to all his immoveable as well as moveable property, subject to all his debts, but is obliged, as I understand, by the laws or the customs of his religion, to maintain, in some degree, the whole family of which he became the head. The parties to this cause, indeed, not having been led, by the opinions on either side, to look to any origin of the practice in question, but the charters, have not directly examined any witnesses as to what the law in force, as between the natives in *Bengal*, is on these subjects, or what are the diversities in the laws of inheritance or succession between the Mahomedans and Hindoos, nor has the evidence, taken under the commission in *India,* attempted to trace back the practice in question, by records or written documents, to its origin, or to show whether it is not coeval with the possession by the Company, of its territories or settlements in *Bengal*; but the evidence, as far as it goes, tends to confirm the solution of the difficulty here suggested, and to prove that the practice is at least older than that charter, to which its legal origin has been referred. 'Lands in *Calcutta* (said Mr. Justice *Macnaughton,* in *Joseph* v. *Ronald*) have been sold in execution ever since the establishment of this Court, and for more than ten years before the decision of that case, in which they were declared to be fee-simple.' And the same learned Judge says, in his depositions, that, though he cannot take upon himself to speak as to the practice or usage, previous to the institution of the Supreme Court, as to lands in *Calcutta* being, or not being, subject to the payment of simple contract debts, or whether they were deemed to be chattels real in the hands of the executor or administrator, but he takes for granted that they were so. Neither of the said Judges, whose evidence is before me, had been in *India* earlier than the year 1789, but *Joseph Barretto,* of *Calcutta,* merchant, a witness who had resided from 1768, states, that the executors or administrators of Europeans, dying in the possession of lands and tenements in *Calcutta,* were, previous to 1788, (the time mentioned in the

1828.

Freeman v. *Fairlie.*

interrogatories,) authorized by the law and usage of *Calcutta*, to sell the same for payments of debts, from the testator or intestate, as well by specialty as by simple contract. That he had heard, and believes, that it is by the law and usage of *Calcutta* that such lands become assets in the hands of the personal representatives, for the payment of simple contract debts, and that he knows this from being resident in *Calcutta*, from the year 1760; and he afterwards states positively, that lands were subject to the payment of simple contract debts previous to the institution of the Supreme Court. Sir *Edward Hyde East* also, in his judgment in *Joseph* v. *Ronald*, states as his opinion, that there is no other difference in the nature or tenure of land in *Calcutta*, whether holden by British, Hindoos, or Mussulman subjects, than what would arise from the application of their different laws of inheritance and succession, which are preserved by Parliament to those different classes; and he adds, 'The land, though real property in its nature and tenure, is made subject to debts in the hands of each of them: in the hands of Hindoos and Mussulmans by their general codes, in the hands of the British, &c., by the terms or construction of the charter, and of the acts auxiliary to it.' That the lands of Hindoos and Mahomedans are subject to debts by their native or general codes, is a fact in which the chief justice could not well be mistaken, and his meaning plainly is, that they are so liable, to the same extent that the lands of a British debtor are, under the practice which he ascribes to the charter. If so, it materially strengthens the probability that this practice was in fact of an earlier date, for otherwise, as the laws and usages of the Hindoos and Mahomedans have certainly not been changed, there must have been a diversity in the process for debt, in the Mayor's Court, according to the class of faith of the defendant, its local jurisdiction having originally extended over all the inhabitants, without any reservation of their particular usage or laws, and as the records and proceedings of that Court are all transferred to the new court of judicature, this fact could hardly have escaped observation. The evidence, therefore, appears to me, as far as it goes, strongly to favour the opinion, that the practice in question long preceded the charter. Nor is there any evidence of a different law of real property having at any time been administered between British subjects in *Bengal*. I am strongly inclined to conclude that the present practice has prevailed, (though perhaps with particular deviations from it, as to the ulterior administration of the proceeds of real estates, or the surplus of those proceeds, arising from ignorance of the proper rules, by executors or administrators, and the heirs in *Europe*,) from the earliest administration of justice in our In-

1828.
Freeman v. *Fairlie.*

dian settlements, or at least from the first purchase of real estates by British subjects, after the territorial acquisitions of the Company in that country. Supposing, however, the practice to have had a more recent origin, and not to have been introduced by a right exposition of the charters, or by any other positive law, still if it was conformable to the law existing in the place at the time of its conquest or cession, it may, I conceive, be supported under the general rules to which I have before adverted, since it cannot be shown that the local law has been since changed by competent legislative authority, either by abrogating the powers of executors and administrators over real estates, or what would be tantamount, by expressly enacting that the whole body of English law, or our whole law of real property, shall be in force among His Majesty's subjects in *Bengal.* If our territorial acquisitions in *India* should, for the reasons here assigned, be regarded as falling under the other rule, and that the first British settlers carried there the law of the mother country, as in the case of a new-discovered country, still that rule is subject to the modification before stated. So much of English law of real property as opposes the practice in question, was, for the reasons assigned, not applicable to the local circumstances, in which the new settlers were placed, and it therefore did not bind them. To hold the contrary, would be to maintain a principle, upon which not only many titles to real estates in *India,* but a great proportion of such titles in most of our West Indian islands might be shaken, no small part of them being held under sales by execution, against executors and administrators, without any positive law to warrant such a departure from the law of *England.* The principle would, in fact, go much further. If the introduction of the English law under either of the said general rules, into a new or ceded country, must be entire, or with no modifications founded on local circumstances, unless by express legislation, much of the unwritten law now in use in the British *West Indies,* and especially much of their law of slavery, stands upon unsound foundations. For these reasons, while I feel myself constrained to dissent from the opinion of the majority of the Judges of the Supreme Court, as to the construction of the charter, I cannot adopt the conclusions of Mr. Justice *Macnaughton,* namely, that the practice in question can only be sustained, by regarding all property, the subject of it, as personal estate, and that there can be no real estate of inheritance in lands or houses in *Calcutta ;* but am of opinion, that the practice may have a legal foundation, though applied to such estates. But the learned Judges further differ in respect of the nature of such titles, as the intestate *Oldham* held ; for supposing that fee-simple estates may exist by law in *Calcutta,* and be inheritable, as in *England,* it does not follow that any such estates in fact exist there; and it is maintained by Mr. Justice *Macnaughton,* that no title derived under *Pottahs* or grants from the Company's Government at *Calcutta,* can amount to an estate of inheritance. In support of this proposition, it is contended, first, that the East India Company itself acquired no fee-simple or absolute perpetual property in the territory granted to it by the native powers, but held it only as their feudatories or vassals, and during their pleasure; or, that if such absolute and perpetual property was acquired, it vested in the Crown, and not in the Company, whose corporate existence and rights in the *East Indies* are temporary, and have been granted or renewed from time to time by successive Acts of Parliament and charters for short terms of years. On the other side, it is maintained that the Company, against both the native sovereigns of *Hindoostan* and the British Crown, have an absolute and perpetual property in the territory so granted, though the sovereign dominion thereof is in the Crown; but that, supposing even the Company's property therein to depend on the duration of the charter, it would not follow that while the charter subsists, the Company has not power to make grants to individuals in fee: and to show that the Company both acquired and has granted such absolute perpetual property in the said territory, there has been produced and read before me on the part of the defendants, *Fairlie* and His Majesty's Attorney-General, a certain paper communicated by letter from Sir *John Newbolt,* Chief Justice of the Supreme Court at *Madras,* to the said Sir *Edward Hyde East,* and by him annexed to his certified opinion in the cause of *Joseph* v. *Ronald,* being a copy of a case submitted to the Judges of the Supreme Court at *Madras,* for the opinion of the Court of Sudder Dewanny Adawlut of *Calcutta,* and the native officers of that Court, with the answers thereto of the Judges of the Court, and its officers, being doctors or professors of the laws of *Hindoostan;* and also a paper annexed to the certified opinion of Sir *Edward Hyde East,* and by him referred to, being extracts of regulations of the Governor-General of *Bengal,* in Council, and of a proclamation of the Governor-General, in Council, of the 1st of *May* 1793, for fixing in perpetuity the jumma or revenue payable to the Company by the *Zemindars* and other proprietors in the Company's territories in *Bengal;* from which documents, and the more regular evidence before me, it seems sufficiently clear that grants of the former sovereigns of *Hindoostan* of the same nature with those under which the Company obtained the territories in *Calcutta,* often, if not generally, conveyed an absolute and perpetual estate to the grantees and their heirs; and the regulations of the

Governor-General and Council, made under the authority of the charter subsisting in 1793, clearly recognize the estates of the *Zemindars* and other actual proprietors of land as hereditary and perpetual estates. But it seems to me immaterial for the purposes of the reference, to determine between the real and personal representatives of the intestate, whether such was in law the tenure by which the Company or its grantees, in general held their lands in *Bengal*, as between the Company and the sovereign of the country ; it appears that the intestate purchased the land and houses in question, as of an estate in fee, which had usually passed as such, and that he had no other estate therein that could be inherited or claimed in his right after his decease. But it is secondly contended on behalf of the plaintiffs and the defendant *Oldham*, the testator's administrator, that the instrument called a *Pottah*, containing a reservation of rent payable to the Company, and having no words of inheritance or limitation, conveys only a leasehold or chattel interest, determinable at the will of the grantor, and the nature and effect of the *Pottahs* in general has been a subject of much controversy between the parties, and of much contrariety of statement or professional judgment in the evidence before me, the instrument being, on the one side, represented as a grant or conveyance from the Company, the terms of which, according to the legal import, must define and limit the estate passed by them to the grantee ; while on the other side, the *Pottah* is stated to be a mere official recognition—a certificate of a title already existing, or alleged to exist in the party applying for it, for the purpose of ascertaining the amount of the jumma, or annual dues payable in respect of the premises described in it, to the collector or treasury of the Company at *Calcutta*. Again, the nature of this jumma is a subject of equal controversy, it being on the one side, represented as rent, payable by the holder as lessee or tenant of the Company, and on the other side, as being either in the nature of a fee-farm rent or perpetual rent-charge, or rather, a mere land-tax payable to the Company, as sovereign or governor for the country, not as proprietor of the soil, or as having any reversionary interest therein. In considering the general effect of the evidence, on these controverted points, I find it, in the first place, to be clear, that the forms of the *Pottahs*, hereinbefore set forth, as those granted for the lots of lands and houses in question, are the ordinary, if not the invariable, forms of these instruments. It was contended, on the original evidence, by the plaintiffs, that the questions in reference to me, might be materially affected by the form of the *Pottahs*, granted to the intestate *Oldham*, or those under whom he claimed, of which there was no proof then before me ; and this was mainly insisted on, as a

1828.
Freeman v *Fairlie.*

reason for suspending my report, until evidence could be obtained from *India*. But the *Pottahs*, proved under the commission, appear to be all in the same general form, with those which are hereinbefore set forth, granted for the lots of lands and houses in question, that is to say, without words of inheritance or limitation, or any express description of the estate, or interest for, or in respect of which they were granted. A copy of one of the *Pottahs*, granted to the said *Hannah Haigh*, was exhibited on the part of the plaintiffs, upon cross-interrogatories, filed by them for the examination of witnesses in the examiner's office, and Sir *Henry Russell* and Sir *William Burroughs*, the former of whom had been a Judge of the Supreme Court, at *Calcutta*, fifteen years, and the latter of whom had been a Judge thereof, or practitioner therein, about twenty years, both in substance deposed that the exhibited corresponded in form with all the *Pottahs* they had ever seen; and another paper, purporting to be a copy of a *Pottah* to *George Vansittart*, Esq., which was in a different form, limiting the tenure during the Company's will or convenience, having also been exhibited on the cross-interrogatories, Sir *Henry Russell* and *William Burroughs*, deposed, in respect thereof, that they did not recollect ever to have seen any *Pottah* issued, by, or on behalf of the East India Company, framed or expressed in the terms, or to the purport or effect, contained in the last-mentioned exhibit: it seems, therefore, presumable, that when the plaintiffs, after publication of that evidence, obtained a commission to take further evidence in *India*, and examined witnesses there, they would not have omitted to prove the alleged *Pottah*, to *Vansittart*, or some other *Pottahs*, varying in form and substance from the exhibit, and limiting or defining the estates or interests for, or in respect whereof the same were granted, if any such *Pottahs*, or the records thereof, in the collector's office, could have been found. But if all the *Pottahs* granted by the Company, or its officers, for lands or houses in *Calcutta*, are like those granted to the intestate, *Samuel Oldham*, or the persons through whom his title was derived, without words of limitation, or any words descriptive of the estate or interest to which they relate, it follows, either that the *Pottah* is not a grant or conveyance, or that the estate or interest granted or conveyed by it, is in all cases the same, and that if the estate of the intestate *Oldham*, in the lots of land and houses in question, was not a fee-simple, or estate of inheritance, from the want of a limitation in the *Pottahs*, to his heirs, the same must be the case with all estates held under *Pottahs*, in *Calcutta*, or in other words, with all the land and buildings held by individuals there; for it is agreed, that a *Pottah* is, or ought to be, taken out upon every change of property, whether by alienation or death.

1828.
Freeman v. *Fairlie.*

From this universality of the tenure, if derived from the *Pottahs*, an argument has been drawn on the part of the defendant *Fairlie*, and of the Crown, against its being leasehold, or less than freehold, because the consequence would be, that there is no real estate in *Calcutta*, or within the provinces of *Bengal*, *Bahar*, and *Orissa*; or supposing the Company itself to have a fee-simple in its acquired domains, that there is no other holder, of any real estate in those provinces, (in the whole of which, the lands of individuals are held under *Pottahs*, in the same form,) and yet the charter founded on, and confirmed by, Act of Parliament, gives jurisdiction as before stated, in actions real, as well as personal, and against all persons, and the executors of persons, who have estates, real or personal, within those provinces; but this argument, though insisted on by some of the professional opinions, in evidence before me, appears to me, to have little or no weight: the true answer to the objection to the *Pottahs*, as being insufficient to pass estates of inheritance, appears to me, to be that which was given by the learned witnesses, late Judges of the Supreme Court, in the depositions here, and which is now confirmed by two out of three of their learned successors, and by a great majority of the other witnesses, examined in *India*, namely, that the *Pottahs* are not, in fact, grants or conveyances, but official recognitions, or certificates, of an already existing title. Yet, there must be, I conceive, an exception to this rule, in the case of lands, called common lands, for the reasons hereinbefore mentioned. The purchaser of land, in *Calcutta*, is stated by Sir *Henry Russell*, (in his deposition, in answer to the 6th interrogatory, on the part of the defendant *Fairlie*,) to derive his title thereto, from and through the conveyance thereof, made to him by the former proprietor, and not from or through the new *Pottah* granted to him, and he adds, that a new *Pottah* is obtained by a purchaser, as a matter of right, and of course. The deposition of Sir *William Burroughs*, in answer to the same interrogatory, is to the same effect, but with more particularity and fulness of expression, to wit, that 'he believes that all lands and grounds situated in *Calcutta*, and in the provinces subject to the jurisdiction of the Supreme Court of Judicature, at *Fort William*, in *Bengal*, are deemed and considered as held of the United Company of merchants, trading to the *East Indies*, and that all such lands and grounds, save only such as are, or have been, granted free of rents, are subject to some rent, or, as it is commonly called, revenue, payable to the said united Company, and are registered by their denominations or descriptions, together with the names, for the time being, of the proprietors thereof, in certain books kept at the offices of the Collectors, appointed on behalf

1828.

Freeman v. *Fairlie.*

of the Company, for the provinces, districts, and cities, within which such lands or grounds are situated, and which books kept in the office of the Collector of *Calcutta,* are called, or known by the name of Chitta Books. That, according to ancient usage in *Bengal,* long anterior, as he believes, to the acquisition of any territorial possession, by the Company therein, certain instruments in writing, called *Pottahs,* and appearing to be in the nature of certificates, of the register of such land or grounds, in the said Chitta Books, are usually granted by the Collector of *Calcutta,* aforesaid, under his hand and seal of office, for, and on behalf of the Company, to the person or persons appearing by the Chitta Books, to be proprietors or owners of the lands or grounds, so registered therein, but that the Company's Collector of *Calcutta,* aforesaid, acts ministerially only, and not in any degree judicially in writing such registers, and granting such *Pottahs,* which are often granted *ex parte,* as he, the deponent, believes, and are almost always expressed, in very few words, and are not, therefore, deemed or considered by the Supreme Court, as sufficient evidence of title, in the person or persons named in, and producing the same as proprietors, although such *Pottahs,* coupled with possession and other circumstances, are received as some, but never as conclusive evidence of title, in the person or persons named as proprietors therein. That when lands or grounds, situated in *Calcutta,* are granted, sold, conveyed, or devised by the owners or proprietors thereof, the grantees, vendees, assignees, or devisees thereof, frequently apply to, and receive from, the Collector of *Calcutta,* a new *Pottah,* made out for, and in the names of such grantees, vendees, assignees, or devisees, after their acquisition of such lands or grounds, under the Deeds, Wills, or Instruments, conveying or devising the same ; and which new *Pottahs* are usually granted, as he, the deponent, believes, to the person or persons producing the former *Pottah,* and the Deeds, Wills, or Instruments, conveying or devising the lands or grounds therein mentioned, to the person or persons so applying, and that he, the deponent, believes, that such new *Pottahs* are often granted, without any proof of the due execution of such Deeds, Wills, or Instruments, and nearly, as of course, except in such cases as may appear to the Collector of *Calcutta,* aforesaid, to require precaution, in which cases it is usual for the Collector of *Calcutta,* as the deponent believes, to post up written notices at his office, intimating his intention to comply with the application, if no objection, that might appear to him to be reasonable, should be made within a limited time, but that no person has ever been allowed by the Supreme Court, as he believes, to support a claim, or title to land or ground, situated in *Calcutta,* under, or by virtue of any new

Pottah, so granted, without duly proving in the Court, the Deed or Deeds, Will or Wills, or other Instruments, conveying or devising the same; nor has the Court ever, as he, the deponent, believes, held it to be necessary, for any persons claiming title to land or ground, situated in *Calcutta,* to produce or prove a *Pottah* for the same, or to show, that after the purchase, or devise of such land or ground, that a new *Pottah* was either obtained, or applied for by the person, or persons, claiming under such purchase or devise.' The account here given by Sir *William Burroughs,* of the power and duty of the Collectors, in granting *Pottahs,* and the grounds on which they are obtained, is confirmed by all the witnesses in *India,* who have deposed to these points, and among others by Mr. *Rock,* President of the Board of Revenue, at *Calcutta,* who states his opinion to be, that the Collector has not authority to grant a *Pottah,* unless the person applying for the same, at his office, produces and shows at such office, some deed, document, or instrument, under which, the party applying, claims title, or shows his right to the land, for which such *Pottah* is applied for. It appears, nevertheless, from the same evidence, and especially from the deposition of Sir *James Edward Colebrooke,* Bart., Chief Judge of the Court of Sudder Dewanny Adawlut in *Bengal,* that there is a case in which the *Pottah* really operates, as a grant or conveyance from the Company, to wit, when the land comprised in it, is common or untenanted land; and it further appears thereby, and by the exhibit deposed to by Sir *James Edward Colebrooke,* in answer to the 2nd interrogatory, on the part of the plaintiffs, that part of the land which is admitted to be comprised in the three lots, or pieces of land in question, was common land, and originally granted by the Company, by *Pottah,* to *Henry Verlest,* Esq., under whom, the title of the intestate *Oldham,* for part of the three lots, or pieces of land in question, was derived. But it also appears thereby, and by other parts of the evidence before me, that the last-mentioned *Pottah,* and other *Pottahs* for common lands, like those which were granted, on existing titles, contained no words of limitation or inheritance; and yet it is stated by Sir *James Edward Colebrooke,* that in his judgment, the person or persons, to whom such common lands were first granted, by such *Pottahs,* took an absolute estate and interest therein, with a power of alienation, gift, or disposal by last Will and Testament, and the same seems to be supported by the testimony of other witnesses, who make no distinction between original *Pottahs,* for common lands, and *Pottahs* on existing titles, as to the absolute nature of the estate. It appears, also, that alienations in fee, by the grantees of common land, under such *Pottahs,* have been recognized by the Company's officers, on

1828.

Freeman v. *Fairlie.*

giving a good title to those claiming under them, for the purpose of obtaining new *Pottahs.* In the case of *Joseph* v. *Ronald,* it was stated by Sir *Edward Hyde East,* Chief Justice, in giving his judgment, that the Company, to this day, transfers its remaining common lands, without any other grant or instrument than *Pottahs,* in the same form, subject to a like small nominal rent, or jumma, of which he cited a recent instance in the case of land, absolutely sold by the government to one *Pietram Doss,* and for its full value. The Chief Justice considered, even these *Pottahs,* for common lands, to be, like the rest, mere recognitions of an existing title, and supported that opinion by the form of the *Pottah,* in the case referred to, a copy of which is annexed to the report of the judgment certified, by him, as hereinbefore mentioned ; for the *Pottah* describes the land, as having belonged to the Company's common ground, and states that it was formerly the property of the Company ; yet no grant had been, in fact, made by the Company, and the Chief Justice added, that it had not been usual, as far as he could learn, particularly as to the small grants, though he had heard that such grants had formerly been made, in a few particular instances. The learned Judge, also took occasion, therefrom, to explain the general nature and use of the *Pottah,* in a manner, which, as it seems to me, to be consistent with all the evidence before me, and to obviate all difficulties arising from the reservation of payments by the name of rent, I think it best to extract from the certified report, in his own words :—'The documents,' he says, referring to the last-mentioned *Pottah* to *Pietram Doss,* of common land, and the record thereof in the collector's office, 'also serve to explain, in a great measure, what the true nature of the small annual payment reserved is, which in the *Pottah* is called rent, for, in the recorded entry of the purchase, and conveyance to *Pietram Doss,* the same annual reservation is classed under the head of jumma, which is the proper term, and means the assessment or assessed revenue. And it is also called jumma in the receipt of the purchase-money entered upon the *Pottah* itself, and this appears to me to be the most probable origin of the small jumma reserved in every minor grant of land, except such as having originally been granted by the *Zemindars,* or by Government itself ; for the religious or charitable purposes have no jumma reserved upon them. Under the Mussulman Government, the *Zemindars,* or independent *Talookdars,* were answerable to the Government for the whole jumma assessed on their respective districts. These, therefore, when they granted out portions of land in perpetuity to others, reserved such proportion of jumma as was calculated or agreed upon between them, in order to reimburse themselves, who were still liable

1828.

Freeman v. *Fairlie.*

to Government for the whole, unless the latter agreed to admit the sub-grantees as independent *Talookdars,* answerable, in the first instance, for the portion of the jumma so reserved. It is not improbable that in some instances more than the exact proportion of the original jumma would be reserved by the sub-grantees, and this would operate, (as the grants were for the most part in perpetuity,) in the nature of a quit-rent or seignorial acknowledgment, and, after a great length of time, it may be difficult, and often impossible, to ascertain the difference, nor is it of any legal consequence to do so, wherever the jumma was fixed. In *Pietram Doss's* case the jumma reserved is quite nominal, being only 2. 6. 8. upon a purchase from Government of its common land, or zemindary waste, 16 cottahs for above 1,900 rupees. The zemindary, including the three villages before named, was itself granted to the Company upon a jumma, reserved yearly to the then Government, of 1,195. 6.; and this 2. 6. 8., if not a fanciful fraction of the ancient original jumma, is reserved in imitation of it, according to the ancient fashion of the country. If the English word rent (he adds) be properly applied to it at all, as it is used in the English form of the common *Pottahs,* it is, in its legal signification, a mere quit-rent, or seignorial acknowledgment, and no other, and is applicable, indiscriminately, to every acknowledged indefeasible estate of perpetual inheritance throughout the country.' Whatever difficulty may remain after these explanations of the learned Chief Justice, to reconcile, with the principles of English law, the passing of a fee-simple estate in the Company's common land, without any other instruments or writing than the ordinary *Pottah,* all the evidence before me relative thereto, is in some very important, and, as I conceive, decisive points, uniform and clear. The title of the holders of land and houses in *Calcutta,* the subjects of these *Pottahs,* who derived, under the original *Pottahs* for common lands, and without any other grant, is, as between them and the East India Company, absolute and perpetual; whether the property is to be considered as freehold or leasehold, real or personal, it is unlimited in point of duration. Even Sir *Francis Macnaughton,* holds that is the case, as to the equitable interest, though his decided opinion is, that the property is not freehold, or real estate; for he states in his deposition, in answer to the interrogatory, on the part of the plaintiffs, that he hath always understood, and always believed, that it was the intention, in the case of lands granted by *Pottah,* both of the grantor and grantee, that the former should not have the power of resumption, and that neither the grantee, nor those claiming under him, should be disturbed in their possession, and that, in a confidence of the permanency of such grants, many have expended

1828.
Freeman v. Fairlie.

large sums of money, upon lands so granted, so as to make the rent reserved by the Company, a matter of little or no consideration, in comparison with the value of the same. That he hath often heard it said by practitioners, and, as he thinks, by Judges, in the said Supreme Court, that in case of any attempt, under such circumstances, being made by the East India Company, to resume the lands, that it would be the duty of the Supreme Court, to restrain them from so doing by injunction; although, from the terms of the *Pottah,* he conceives it cannot convey a freehold estate, yet, that from the intention of the parties, manifested as it has been, ever since (so far as he knows) *Pottahs* have been granted, that in his opinion, a Court of Equity would, and ought to consider, the grantee, and those holding under him, as having a permanent interest in the same; but so far as his, the deponent's knowledge extends, no attempt at resumption was ever made by the East India Company. Other evidence before me, shows that the Company, in as strong a case for resumption as could well arise, has practically admitted, the perpetual and irrevocable effects of its own grants by *Pottahs,* buying back at an excessive price, land in *Calcutta,* that had been so granted, when wanted for the public uses; the grantee or holder under *Pottah,* refusing to sell it on reasonable terms. It is also the uniform effect of the evidence before me, as to the jumma, that, whether to be regarded as rent or revenue, it is fixed in amount, and cannot be raised by the Company, beyond what is specified in the original grant or *Pottah.* The plaintiff, indeed, contended on the original evidence, that there was proof of the jumma being a reserved rent, and the tenure being leasehold, resumable by the Company, from the fact that the rent paid by the defendant *Fairlie,* for the lots of land and houses in question, had varied in its amount in different years, but this apparent variance has since been explained in a way satisfactory. It appearing from the receipts produced by the defendant *Fairlie.* that he was inaccurate in stating the periodical payments by him, in respect of the lands and houses, as ground-rent, and that they, in fact, sometimes comprised a watch-tax, and other public taxes, from which the apparent inequality proceeded, and that the rent or jumma was always the same in his payments.

"Upon these facts, it seems to me to be clear, even as to the common lands, of which the *Pottah* is the only conveyance, or evidence of title, that the purchaser from the Company with a *Pottah* in the ordinary form, obtains at least an equitable fee, and that the objection resolves itself into this: from the want of a proper conveyance, the legal estate, as to the inheritance, does not pass to the grantee, but remains in the Company. But even this objection,

1828.

Freeman v. *Fairlie.*

seems to me to rest on the assumption, that the whole body of English law, in relation at least to real property, has been introduced into the Company's settlements in *Bengal*, with such exceptions and qualifications only, as the charters expressly or by implication provide:—a doctrine, for humbly dissenting from which, my reasons have been already assigned. If that assumption is erroneous, there seems to be still less reason, for holding as to the principles and forms of conveyancing, than as to the remedies of creditors, and the powers of executors or administrators as to real assets, that they must necessarily have been made, to conform in all points to English law, when that law was in general introduced. It appears incidentally, in the evidence before me, that prior to the establishment of the Supreme Court, conveyances by lease and release, or other English forms, were little, if at all, in use, upon the sales of lands or houses from one British subject to another, but a brief note of the sale and transfer was used in their stead. It appears, also, that the *Pottahs* were in use among the natives, and regarded by them as the best or only muniments of their private titles; and it may, I think, be further collected, that the only written evidence of grants from the native sovereigns, to *Zemindars*, or other proprietors of land, was a *Pottah* in the same form with those since used by the Company's Government, for the same purpose. It seems, therefore, to have been a natural, if not a necessary course, by the Company's servants, and other British subjects, to use the same means that they found to be established, for the granting and transferring lands and houses, at what, I conceive to have been, the true era of their tacit introduction of English law, namely, the first establishment of the Company's settlements in that country, till long after which they had no regular Courts, and probably no practitioners of law capable of preparing conveyances, in the English form. I humbly conceive, therefore, that the *Pottah*, when it performs the functions of a grant, as in the case of common lands, by the Company, may be considered as a sufficient creation, or evidence of title in fee, under that part of the law of the place, which was not necessarily superseded or abolished, by the introduction of English law, on the principles to which, I have already referred. On the whole, the conclusions which I have humbly to submit to the Court, in pursuance of the said order of reference, are, that the said lots of land and houses being the only messuages, lands, tenements, and hereditaments, of which the said *Hannah Haigh*, the testatrix, was in any manner seised, possessed of, or entitled to, at the time of the making her Will and Codicil, and of her death as aforesaid, did not pass by her said Will or Codicil, and that the nature or kind of tenure thereof, was freehold of inheritance,

1828.

Freeman v. *Fairlie.*

and that the said testatrix was entitled to dower therein, it not appearing that she had done any act, to bar or release her right of dower, in the real estates of her said second husband, deceased, *Samuel Oldham,* the intestate. And as to the inquiry, whether the testatrix, *Hannah Haigh,* had any other lien, claim, or interest in, or to the said freehold hereditaments, or any part thereof, and whether they were subject or liable to any, and what debts, charges, or incumbrances affecting the same ; I find that they were subject to all the debts, whether simple contract or otherwise, of the said intestate, and humbly conceive that if she, the said *Hannah Haigh,* as his administratrix, paid any debts of her said intestate, beyond the amount of any personal assets, and any rents or profits of the said real estates, (over and above her dower therein,) by her reserved in her lifetime, the said defendant *Fairlie,* as her personal reprsentative, may be entitled in equity to stand in the place of the creditors, who were satisfied by her out of her own estate, and to be considered as an equitable incumbrancer on the said real estate, or the rents, issues, and profits thereof received since her death, but no claim of any such charge or incumbrance, or for any debt due by the said intestate in his lifetime, has been brought in before me. And as to the inquiry, who was the heir-at-law of the said *Samuel Oldham,* the Master found that in consequence of it appearing before him, that there were no descendants of *Samuel Oldham,* except *Elizabeth Smith* and *Charlotte Oldham,* who were the daughters and co-heiresses of *Thomas Oldham,* the brother of *John Oldham,* the father of the intestate *Samuel Oldham,* but which *Thomas Oldham* was born previous to the marriage of his parents, and therefore illegitimate, he was unable to certify who was the heir-at-law of the intestate *Samuel Oldham,* or whether his estate of inheritance has escheated from default of heirs of his blood.''

To this report the plaintiffs filed twenty-five exceptions, comprising a great variety of formal objections to the finding of the Master, with a view to prevent conclusions ; the principal objection, however, was, as to the nature of the tenure of lands in the *East Indies,* and was comprised in the twenty-fifth exception, which was as follows :—

''For that the said Master, by the said report, has certified as to the said lots of land and houses, that the nature or kind of tenure of the said lots of land and houses, was freehold of inheritance; whereas, the said Master ought not so to have certified, but ought to have reported that the tenure thereof, is of the nature of chattels real or personal estate, or else a customary estate by *Pottah,* the custom whereof is such, that on the death of a person possessed of lands or houses held thereby, the same, with a right to have

1828. *Freeman* v. *Fairlie.*

a new *Pottah* thereof granted, passes to, and vests in, his executors, or administrators, to be administered as personal estate.''

In the year 1827, these exceptions were argued before Lord *Lyndhurst,* who at that time was Master of the Rolls, and having been promoted to the Seals before pronouncing any decision, the parties agreed to take his judgment, as if they had been appealed to him. The peculiar circumstances of the case, and the authorities relied on, in the arguments of counsel on either side, are contained in the Master's report, and the commentary of the noble Judge.

17 November.

LORD CHANCELLOR :

This is a case relating to the tenure of lands in *India,* and the question is of considerable consequence, as far as it regards the individual case ; of great importance in point of principle ; and the more entitled to consideration, as there appears to have been a difference on the subject among the Judges in *India.* A great body of evidence was adduced before me respecting it, and the question was very elaborately and ably argued by the counsel on both sides. Having fully examined the evidence, and attentively considered the case, I will now proceed to state the result.

There were twenty-five exceptions to the Master's report. The first and fifth related to collateral matter, and after proper explanation at the bar, it was agreed that those exceptions should be waived, and that the finding of the Master should not operate prejudicially to the parties in the future stages of the case. The other exceptions, all but the last, were mere formal objections to prevent conclusions ; and it was ultimately agreed, that the whole case would turn upon the judgment which the Court should pronounce upon the last or twenty-fifth exception.

The question, therefore, is, what, generally speaking, is the nature and tenure of land in *India ;* and, in particular, what is the nature of the tenure of those lots of land which formerly belonged to *Samuel Oldham.* The particulars of the estate of *Samuel Oldham,* and his title, may be stated in a few words : It appears, that one lot of land, part of the property, was conveyed to him by deeds of lease and release, in the year 1780 ; the release to him, his heirs, executors, and administrators, to hold to him and them, to his and their own use for ever. And there was a covenant on the part of the grantor, *Andrews,* that he was possessed of an indefeasible estate of inheritance in the property. After the lease and the release was executed, and the conveyance so far perfected, application was made by the grantee, *Oldham,* to the Collector's Office, for a *Pottah,* the particular nature and form of which instrument I shall, by-and-by, advert to.

The *Pottah*, upon the production of his title by the deeds, was granted to him as a matter of course.

Another lot of land, one of the three in question, was, in the following year, granted to *Samuel Oldham*, by the same grantor, *Andrews*, by the same form of conveyance; and two or three years after, a third lot of land, which appears to have been, I believe, common land, untenanted land, formerly belonging to the East India Company, and for which a *Pottah* was granted to a person named *Verelst*, was conveyed, by deeds of lease and release, by *Petre* to *Oldham*. *Petre* held that property under a person of the name of *Richard Johnson*, who conveyed it to him also by deeds of lease and release; and, I think, it appears that *Johnson* held it directly from *Verelst*. A *Pottah* was also granted of this land upon the production of the conveyance. This was the title of *Oldham*.

The question, under these circumstances, and according to the law, as it applies to *India*, is, whether *Samuel Oldham* had an estate of inheritance descendible to his heirs. The first thing to be considered is, what was the state of landed property among the natives of *India*, when the English settlement was originally established in that country; I am speaking of the district of *Calcutta*. This is certainly involved in some obscurity; but there are two documents, which were referred to in the argument, that throw great light on the subject, and have contributed to remove almost all doubts from my mind with respect to it.

These documents are, in the first place, the regulations of 1793, distinguished by the name of the permanent regulations. I think it is to be collected from those regulations, that the proprietors of land in *India* had an absolute ownership and dominion of the soil; that the soil was not vested generally in the sovereign; that the proprietors did not hold at the will of the sovereign; but held the property as their own, with the power of disposing of it absolutely; and, if not disposed of, that it descended to their families. It is liable, indeed, to a tribute to the Government, but it appears that the tribute was not fixed, but was increased at the arbitrary will of the Government; and it appears further, that, if the tribute was not paid, Government had the power of taking possession of the lands for the purpose of obtaining payment. Still, notwithstanding these circumstances, and these charges, I think it is impossible to read those articles, which were prepared obviously with great caution and consideration, by persons well acquainted with the subject, and possessing every means of obtaining the most accurate information on it, and as far back as the year 1793, without coming to the conclusion that the *Zemindars* and *Talookdars* were owners of the soil, subject only to a tribute, such as I have stated, to Government; and it was the object of those regulations of the year 1793, to make that tribute which had been considered as dependant in its amount on the will of the governing power, fixed and permanent. But I do not rely merely on the regulations of 1793. I look, secondly, at another series of documents,—the case submitted to the Sudder Dewanny Adawlut, for their opinion,—and the documents which accompany that case, and which were laid before me. Looking at those documents and opinions, which were referred to in the course of the argument, and considered as materials on which the parties relied, and which were annexed, I think, to the certified opinion of Sir *Edward Hyde East*; and considering, with the best intention in my power, these papers, they confirm, most strongly, the opinion I should have derived from the permanent regulations: namely, that the proprietors of the soil had a permanent interest in it at the time when the English established themselves in that settlement.

The next question is, what is the law, as far as British subjects are concerned, now existing in that settlement? Undoubtedly, at present, it is the law of England. I think it clear, that those persons who there established themselves, carried with them the English law. It does not appear, at least it has not been stated, that the English law was established there, in the first instance, by any proclamation or charter; but it is probable that the English carried with them, and acted upon, the law of England, from the necessity of their situation; because the two systems of law, which at that time existed there,—the Mahomedan and Hindoo laws,—were so blended with the particular religions of the two descriptions of persons, as to render it almost impossible for that law to have been adopted by the English settlers. This, however, is matter rather of speculation, than material to this question; since it appears, by all the charters applicable to the state of the law, and by all the Acts of Parliament which refer to it, from the year 1601 down to the present time (and I refer particularly to the charter of 1726), that the English law has been considered as the law of the settlement. It has been recognized as such by the competent authority; and we are to consider, as far as British subjects are concerned (for it is confined to British subjects), that the English law is not only now the law of *Calcutta*, but that it was so from the earliest period of that settlement.

The next consideration then, is this:—If the native proprietor possessed a permanent interest in the soil, taking all the interest the native had, would the English law apply itself to that interest? In other words, would a permanent interest in land, vested in an English subject, where the English law prevails, and a permanent interest in the soil gives an entire and absolute dominion and ownership—be governed by English law? Is it not an estate of inheritance, descending to the heirs? Can it hardly be denied (though, in part of the argument, it was, to a degree, controverted), that the interest of *Oldham* in this property was an absolute and permanent interest? and the question made, was, whether it passed to one description of representatives, or to another. If it appears on the evidence to be an absolute ownership, what law is to be applied to it? Those who contend it goes to the personal representatives, in a degree apply to it the English law; because the law as to personal representatives is an English law. If, then, we are to apply to it the English law; if the absolute ownership of the soil is possessed by the party, and the English law is in any shape to be applied to it, the party must take a fee-simple, and the property will descend to his heirs.

We now come to consider the evidence; a body of evidence, as great as could be collected, for the purpose of application to such a subject, has been adduced on the present occasion. There is, first, the evidence of Sir *Henry Russell*, taken shortly after his return to *England*, when his recollection was fresh and vigorous with respect to the state of the law in the country which he had left. He had been for many years a Judge in that country; he had also been for several years the Chief Justice of the Supreme Court of *Calcutta*. There is the evidence of Sir *William Burroughs*, who was in that country, engaged in the profession of the law in different shapes, for a period of more than twenty years, about half of the period as a barrister, I believe as Advocate-General, and the remainder as one of the Judges of the Supreme Court. There is the opinion of Sir *Edward Hyde East*, not given as evidence, but delivered in the shape of a formal judgment of the Court (and, perhaps, therefore, entitled to more weight than if it were in the shape of evidence), directly applicable to the subject. There is the evidence of Sir *Anthony Buller*, one of the Judges of the Supreme Court, presented in the same way. There is the evidence of the remaining Judge, Sir *Francis Macnaughton*, which does not appear to me so much to differ with respect to the material facts of the case, as to the conclusions and the inferences which he draws from them. There is the evidence of Mr. *Robert Smith*, who for many years held the office of Advocate-General at *Calcutta*. There is the evidence of a gentleman who filled also, for several years, the office of Advocate-General, and was in a more extensive practice, perhaps, than any man that ever went out to that country as a practising barrister, I mean Mr. *Robert Fergusson*. There is the evidence of Sir *Edward Colebrooke*; and a great variety of other individuals, whom it is not necessary particularly to name. Now, as to the result of this body of evidence, what are the facts established by it? I think it beyond all doubt, that property of this description has, from the period of the year 1774 (the date of the Charter of Justice), been constantly conveyed by deeds of lease and release, in the form in which *Oldham* took the property in question. It is proved also, and by one of the officers of the Court, that, of land of this description, fines are levied. It is proved by all these persons, that it has been the constant course of the Supreme Court of *Calcutta,* when ejectments are brought by the heir-at-law, on establishing the possession and title of the ancestor, and proving the claimant is the heir-at-law, in such ejectments, the heir has always recovered. It was asked, in the course of the argument, whether any case could be named. It is stated by these witnesses, as a circumstance of constant occurrence, and, therefore, it is not very easy immediately to name a particular case, because, being a thing of constant occurrence, there would be no motive for recollecting one ; but it happens that, in the judgment of Sir *Edward Hyde East,* he does incidentally name a case, that of *Doe,* on the demise of *Gasper* v. *Doss,* in which the heir-at-law (an American) recovered property, in an action of ejectment, under the circumstances to which I have referred.

There are some other circumstances to which these witnesses speak, tending to establish the fact, that from the year 1774, down to the present time, this property has always been treated in *India* as real property, descendible to the heir-at-law ; they not only state the facts to which I have referred, and other facts which might also be mentioned, but they state it as the result of their experience, of their knowledge of the law of the country, and their inquiry into it ; as the result of their long practice, and of their observations of the decisions of the Courts in which they themselves have been partakers and actors, that property of this description had always been considered as real property, descendible to the heir. But, further than this, if we refer to the Charter of Justice in the year 1774, granted by the Crown, we find, in the language of it, a distinction expressly drawn, and in terms between personal and real property. It has, I think, been said, by one of the learned Judges to whom I have referred, or it has been glanced at, that that may be satisfied, by considering this property as a chattel real ; but, looking further into the charter, it will be found that this explanation will not avail, because the Courts have jurisdiction expressly, and in terms, in all actions, and pleas, real, personal, and mixed ; a recognition, therefore, by the Crown (the highest authority), the real property exists in that country, according to the meaning of that term as used in the law of England.

1828.
Freeman
v.
Fairlie.

But the case does not rest here. We may refer to express decisions on the subject; decisions of that tribunal most competent, from its peculiar situation, to form a correct judgment on the subject; I mean the Supreme Court of *Calcutta* itself. As far back as the year 1785, this case came directly for decision before the Court. The question turned upon the execution of a Will of a person named *William Wiffin;* that Will was attested only by two witnesses, and the question was, whether it passed a real estate. The Court decided that it did not; and, in deciding that question, they, in the first instance, decided that the property was real property, according to the law of England, descendible to the heir. And they also decided, for that was necessary in the view which two of the Judges of the Court took, that the Statute of Frauds extended to *India.* The third Judge, Sir *William Jones,* did not think it necessary to decide this last point, because of the opinion which he had formed with respect to the construction of the Will itself; but as to the general question, with regard to the tenure of the property, he entirely agreed with the other Judges. The question came again before the same Court, in the case of *Joseph* v. *Ronald;* it was then very elaborately argued, on account of the difference of opinion entertained on the bench. We have before us the judgment of the Chief Justice, and also the judgment of Sir *Anthony Buller,* and we have the judgment in print, under his own authority, of the third Judge. That judgment confirmed the previous decision, not by the unanimous voice of the Court, but by the voice of the Chief Justice, and of Sir *Anthony Buller;* the other Judge, Sir *Francis Macnaughton,* dissented. I have read through the reasons assigned for his judgment; they are very unsatisfactory to my mind, and I must say, I concur in the view taken by the majority of the Court.

ADVOCATE

This, then, is the case as it presents itself in one view of it. But it is argued that these are estates held by *Pottah;* that the *Pottah* is an instrument which cannot convey an estate of inheritance; that even if it could convey such an estate, the East India Company have only a transitory interest in the settlement; and that they could not convey a greater interest than they themselves hold. With respect to the last point, I will dispose of it first. The East India Company is a corporation; they are capable of taking land in fee; they are capable of disposing of lands so taken in fee; and if an Act of Parliament should interpose to put an end to their corporate existence, the title of the holder of any property which the Company may have taken in fee, and which, while they were a corporation, they disposed of in fee, would not, by the extinction of the corporation, be at all, in my judgment, affected. But this is a mere question of speculation; because in an Act which authorizes Parliament, upon a three years' notice, at a given period, to put an end to the exclusive trade of the East India Company, and to their territorial dominion in *India,* in that very Act there is a proviso, that it shall not affect their corporate character : that character will continue, and they may, as before, carry on trade, though not exclusively. It appears to me, therefore, that this argument is entirely destitute of foundation.

Then, as to the *Pottah,* it may be material to read the language of it, and then to see what the evidence is, as applied to these instruments. It appears that upon the transfer of possession, or rather of title, upon a conveyance, for instance, by a former owner, by deeds of lease and release, to a new proprietor, he, carrying his title deeds to the collector, obtains a new *Pottah,* as a matter of right ; the collector cannot refuse it ; the proprietor can insist upon it. In the same manner the heir-at-law, going before the collector, and satisfying him that he is the heir, is entitled to the *Pottah.* There is a rent, as it is said, according to the translation, payable on these *Pottahs.* I think it quite clear that rent is a tribute or jumma : and Sir *Edw. Hyde East,* in his judgment, refers to a document, by which it is put, I think, beyond all doubt that it is the jumma which was fixed by the regulations of the year 1793. If part of the estate should be alienated, then this rent, or jumma, or tribute, is apportioned between the two proprietors. This *Pottah,* it may be remarked, is issued by the collector ; he is the officer of the Government, and it appears upon the very face of it, that it was nothing more than a fiscal regulation, introduced for the purpose of collecting the tribute to which the land is subject. Sir *Henry Russell* is distinctly examined with regard to it ; he says, that in establishing a title to land in a Court of Justice, the *Pottah* is not necessary ; it frequently happens that after the title-deeds are produced and proved, the *Pottah* also is produced, but he has known instances where the *Pottah* has not been produced, and the parties have recovered ; and he does not consider, and it never was considered while he was a Judge, that it was necessary to produce the *Pottah.* The *Pottah,* therefore, forms no part of the title ; it is the conveyance that gives parties a right to claim the *Pottah* ; and by having the latter, the amount of the sum payable to the Government is ascertained, and future doubt prevented.

But it was said, in this particular case, as to one of the portions of land, that it was common land, granted by the East India Company, and that there was no deed of conveyance, the *Pottah* being the only conveyance. Sir *Edward East,* in his judgment, says, he knows it has been the practice of the Company, in small grants of land, to direct the collector to issue the *Pottah,* without making a conveyance. In this particular instance, whatever the East India Company may have, the grantee, or rather the person who took from the grantee (for there is no evidence of any deed from *Verelst,* to whom the *Pottah* was in the first instance granted), *Johnson,* who took from *Verelst,* conveyed by deeds of lease and release to *Petre,* and *Petre* conveyed, ultimately (for there was first a deed-poll), by lease and release to *Oldham,* in the same form as the deeds of lease and release to which I have before adverted. What, then, does the case come to, supposing no deed has been executed by the East India Company, who were the proprietors of the land in their corporal capacity, and not as rulers of the country? Does it come to anything, except a possible defect in the title, namely, that a proper deed was not executed by the first grantor? But that does not at all affect the question we are now considering. That the East India Company, when they convey these small portions of land in the way I have stated, without executing deeds of lease and release, or any conveyance beside authorizing the collector to issue the *Pottah,* consider they are conveying the absolute property in the soil, is quite clear from the evidence. Sir *Edward Colebrooke* speaks to this effect. And then is the circumstance of a man's taking land of this description in this way, from a confidence in the East India Company, for the purpose of building, in which large sums of money are laid out, which never would be expended but upon the assumption that the party had a permanent interest in the soil—is this, I say, to prejudice him? Nay, more, it has in several instances occurred, that the East India Company, after making grants of this description, have been desirous of having the land again, for raising public works, and they have purchased it back from those who were considered the owners of the soil, at a very large price. It appears to me, therefore, that nothing turns upon the distinction attempted to be taken between this third portion of land and the other portions.

I omitted to state (what has been called to my recollection by seeing a gentleman now in Court) that the question respecting the nature of this property has been decided here in England, in a case of *Gardiner* v. *Fell,* which was cited in argument at the bar, and which was decided in the year 1785. In that case, the very point was raised in this Court, with regard to an estate in *Calcutta,* called Barrisaul Estate. The owner of that estate devised it by Will, attested only by two witnesses; the case came on before Sir *William Grant,* when Master of the Rolls: it was referred to the Master to inquire into the law of *India* in that respect; he had evidence before him upon it, and he reported that the estate was a fee-simple of inheritance, and would not pass unless the Will was attested by three witnesses. In another case of *Comyns* v. *Fletcher*, the parties who were interested in disputing the fact acceded to it ; and, supposing the property had escheated, presented a memorial to the Crown, praying that it might be conveyed to them, subject to the trusts of the Will. It is true a case was cited at the bar, of a contrary effect,—I mean the case of *Short* v. *Cove*. That was also referred to the Master, who came to an opposite conclusion, for he found that it was personal estate ; and that report was confirmed. But, looking at the order, it was confirmed, as I conceive, by consent. And that case was decided on the very testimony of one of the witnesses in this cause, Sir *William Dunkin*, a person certainly, from his situation, competent to have formed a correct judgment on the subject ; yet, in looking at his evidence as reported by the Master, it not only is in direct opposition to the whole body of evidence laid before me in this case, but is in direct opposition to that about which there can be no mistake—the decisions of the Courts in *India* ; and therefore, I believe the Master in the present case, placed very little reliance on the testimony of Sir *William Dunkin*.

The other point that has been insisted upon, and on which, a great part of the argument turned, was, that this property is assets in the hands of executors or administrators, for payment of the testator's debts by simple contract. I confess I never myself, felt the weight of that argument. Suppose an Act of Parliament were to pass, similar to that which passed during the last session, with reference to *India* ; suppose a similar Act were to pass with respect to land in *England*, —it would render real property assets for the purpose of paying the simple contract debts of the testator or intestate, but it would not alter the tenure of the land ; the land would still be inheritable—it still would descend to the heir-at-law ; I do not therefore perceive the force of the observation ; if it were introduced by competent authority, it would be a charge or a liability, engrafted or imposed on the real estate, to which, otherwise, it would not be subject ; in what way it was introduced, does not, I think, very distinctly appear. I must own I am not (and I agree with the Master in this respect) perfectly satisfied with the arguments of the Chief Justice, Sir *Edward East*, in which he refers this wholly to the charter. I think it not improbable that it crept in at a very early period, when the law was not much attended to in that country ; it got established by use ; it was continued as being found convenient ; and perhaps it has no legal origin ; it now has, however, the sanction and authority of an Act of Parliament. If it had a legal origin, it appears to me that it would not affect the decision of this question ; if it had not a legal origin, still less would it affect it ; the only way in which it can be used at all, is as an argument, that it being an incident to personal property, to be applicable to the payment of debts, this should be considered personal property ; but as an argument standing alone, I think it weighs very little in opposition to the weight of argument and evidence on the other side ; and therefore, considering every part of this case, and judging, after the best attention I am able to give it, I agree entirely with the Master in thinking this is to be considered as freehold of inheritance, as real property according to the law of *England*, and not as real chattel, or as personal chattel ; nor is it to be considered as estate held by *Pottah*, subject to those regulations mentioned in the exception, but, conformably with the finding of the Master, it is freehold of inheritance according to the acceptation of those terms by the law of *England*. The report must therefore be confirmed.

CASES IN THE PRIVY COUNCIL

ON APPEALS FROM THE EAST INDIES.

Madho Row Chinto Punt Golay, (and, after his death, his brother,) Eswunt Row Chinto Punt - - } *Appellant,*

v.

Bhookun-das Boolaki-das - - - *Respondent.**

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Principal and Agent—Evidence necessary to show wheher person is agent or is authorised to act on behalf of another—Quantum of.

A party resident at *Baroda* indorsed two *hoondies*, or bills of exchange, in the name of a firm carrying on the business of banking at *Surat*, alleging himself to be the *gomashtah* or agent of the firm, and afterwards, on the bills being dishonoured, absconded. *Held*, that in order to fix the firm at *Surat* with the amount of the bills, clear evidence ought to have been produced of the authority to act as *gomashtah*, and their Lordships not being satisfied with the evidence admitted in the Courts below, reversed the decrees of both the Zillah and Sudder Court with costs.

8 February 1837.

This was an appeal from a decree of the Sudder Adawlut of *Bombay*, whereby a previous decree of the Zillah Court of *Surat*, in favour of the respondent (the plaintiff in the original suit), was affirmed.

The suit wherein these decrees were pronounced was instituted by the respondent in the Zillah Court of *Surat* on the 22nd of *May* 1822, against *Madho Row Chinto Punt Golay* and *Kundoo Bucha-jee*, his alleged *gomashtah* or agent, to recover from them the sum of rupees 2,999, of which sum rupees 1,900 was the amount of two *hoondies* or bills of exchange, which had been indorsed by *Kundoo Bucha-jee* in the name of *Chinto Punt*, the deceased father of the defendant,

---

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Sir John Nicholl, and the Chief Judge in the Court of Bankruptcy.

Privy Councillors,—*Assessors*, the Right Hon. Sir Edward Hyde East, Bart., and the Right Hon. Sir Alexander Johnston.

1837.

MADHO ROW CHINTO PUNT GOLAY *v.* BHOOKUN-DAS BOOLAKI-DAS.

Madho Row, in favour of the respondent's firm, *Tapi-das Bhookun-das,* for valuable consideration : the residue of the sum laid in the plaint was for premium, interest, and loss incurred by the dishonour of the bills.

The two *hoondies,* both of which were produced in evidence, were respectively dated the 2nd of *Maghsood* 1872 (2nd *January* 1815-16), and were drawn by *Roop Chund Deo Chund* at *Baroda* upon *Hurree Curran* of *Poona,* in favour of *Madho Row's* father, the said *Chinto Punt,* and were sold and indorsed in the name of *Chinto Punt,* the drawee, to *Tapi-das Bhookun-das,* the respondent's son, who carried on the respondent's business at *Baroda.*

The defendant, *Madho Row Chinto Punt Golay,* was the son and heir to *Chinto Punt,* who was deceased, and having come to reside in *Surat,* rendered himself amenable to the jurisdiction of the Zillah Court.

The respondent (the plaintiff in the original action) alleged, that *Kundoo Bucha-jee,* the second defendant, as the *gomashtah,* or agent of the firm of *Chinto Punt* of *Baroda,* had purchased the bills from *Roop Chund,* and sold them to the respondent's firm at *Baroda*; that on the bills being dishonoured, application was made to *Kundoo Bucha-jee* to pay the amount, and the expenses which had been incurred, which he promised to do, but afterwards absconded.

In the course of the proceedings in the Zillah Court an objection was taken by the defendant, *Madho Row Chinto Punt Golay,* to the competency of the Zillah Court, in point of jurisdiction, to entertain the suit, on the ground that the transaction took place at *Baroda,* which is situate beyond the local limits of the Zillah Court's jurisdiction, and is within the territory of the *Guicowar* government, and also because the defendant

1837.

MADHO ROW CHINTO PUNT GOLAY *v.* BHOOKUN DAS BOOLAKI-DAS.

was himself a subject of that government: and before the evidence was gone into, and pending the suit, at *Surat*, he presented a petition to the *Guicowar* government to make inquiries into the case. That government directed four bankers at *Baroda* to ascertain what transactions *Kundoo Bucha-jee* had with the respondent. After an examination of the respondent's *gomashtah* at *Baroda*, and of *Roop Chund Deo Chund*, the drawer of the bills in question, and also an inspection of the books of *Moosur Neela*, who appeared to have been a partner with *Kundoo Bucha-jee*, these bankers came to the conclusion that no claim of the respondent was established against *Chinto Punt*. A *newad-patra*, or order in the nature of an injunction, was in conformity with this decision of the bankers, granted by the *Guicowar's* government to *Madho Row Chinto Punt Golay*, to prevent the respondent from thereafter making any claim either against him or *Kundoo Bucha-jee*.

Kundoo Bucha-jee having absconded, the suit was prosecuted against the defendant, *Madho Row Chinto Punt Golay*, alone. By his answer he tendered two issues, namely, that *Kundoo Bucha-jee* was not the *gomashtah* or agent of his father, *Chinto Punt*, and that *Chinto Punt* had not any banking transactions at *Baroda*.

The evidence adduced by the respondent, (the plaintiff in the Zillah Court,) was, first, the two bills upon which the claim was founded: secondly, a written statement, addressed by the bankers and merchants of *Baroda* to the bankers and merchants of *Surat*, and bearing twenty-eight signatures, the purport of which was, that the bankers, signing the statement, had examined the books of account of various merchants, and that it appeared that *Kundoo Bucha-jee* transacted business in the name of *Chinto Punt* ; also, that the amount of the bills was credited to *Chinto Punt* in the books of *Gopal Row,* by the orders of the respondent's firm ; and that the amount of the bills was debited in the books of *Roop Chund* (the drawer) to *Chinto Punt* ; which proved that *Kundoo Bucha-jee* was his servant : thirdly, the plaintiff also examined, at *Surat,* three witnesses ; two of whom being the agents and managers of two several firms at *Surat,* verified the signatures of the agents at *Baroda,* of the same firms, to the written statement of the bankers and merchants of *Baroda.* The third, who was the manager of a firm carrying on business at *Surat,* verified the signature to the written statement of the *gomashtah* who conducted the business of the same firm at *Baroda.*

As, upon the points, whether *Chinto Punt* formerly carried on the business at *Baroda,* and whether *Kundoo Bucha-jee* was the *gomashtah* or agent of the house, the fullest and most complete information could only be obtained at *Baroda* ; the Zillah Court transmitted to the Resident at *Baroda* certain questions, upon which several bankers or merchants, at *Baroda,* were to be examined upon oath.

The return made by the Resident at *Baroda* to the commission for an examination of witnesses, consisted of the evidence of five persons, who were merchants, or the managers of different firms carrying on business at *Baroda.* Of these witnesses, three deposed to transactions in business having been carried on by *Kundoo Bucha-jee,* on behalf of *Chinto Punt,* at *Baroda* ; but the effect of their evidence left it doubtful, whether *Chinto Punt* had any shop or actual house of business at *Baroda.* Another of the witnesses negatived the existence of a house of business at all at

Baroda belonging to *Chinto Punt.* Two witnesses, (*Roop Chund* and *Gopal Row,*) were however produced by the plaintiff to establish the liability of *Chinto Punt* and his son and heir, the defendant, *Madho Row Chinto Punt Golay,* upon the bills in question.

Roop Chund stated that he had had transactions with *Chinto Punt,* which were carried on by *Kundoo Bucha-jee* as his agent, and in his name ; and he produced a copy of an account-current, headed, "Cr. *Account current with Chinto Punt Golay.* Dr.," which contained a debit to *Chinto Punt* of the bills on which the plaintiff sued. He also deposed, that the bills were given by him to *Kundoo Bucha-jee,* on the behalf and as the *karkoon** of *Chinto Punt.*

Gopal Row, the other witness, stated that he had transacted business with *Kundoo Bucha-jee* as the clerk, and on the account of *Chinto Punt* ; but neither this witness nor *Roop Chund* stated distinctly that such transactions with *Kundoo* were on behalf of *Chinto Punt* ; and he produced a copy of an account between himself and *Chinto Punt* ; by which the witness had charged himself with various sums as received on behalf of *Chinto Punt,* in whose favour there was an ultimate balance of rupees 800.

Before the suit was ripe for judgment in the Zillah Court, *Madho Row Chinto Punt Golay,* the original defendant, died, and *Eswunt Row Chinto Punt* (the present appellant) was admitted, as his heir and representative, to defend the suit.

On the 4th *February* 1826, the Zillah Court of *Surat,* upon the evidence which had been taken, pronounced a decree in favour of the respondent for the amount of his demand, with interest and costs.

---

* Transactor of business.

1837.
MADHO ROW CHINTO PUNT GOLAY *v.* BHOOKUNDAS BOOLAKIDAS.

The appellant appealed from this decree to the Sudder Adawlut at *Bombay* ; but that Court, on the 24th of *August* 1826, affirmed the decree of the Zillah Court, with interest and costs.

The appellant subsequently appealed to His Majesty in Council, submitting the following reasons :—

I. Because there was no evidence before the Court at *Surat* of any connection between the appellant's brother, *Madho Row Chinto Punt,* or the appellant, with *Kundoo Bucha-jee,* or of any liability of either of them in respect of the bills in question.

II. Because the non-liability of the respondent's brother, in respect of those bills, had been established by the decree of a competent Court at *Baroda ;* where the whole of the transactions which gave rise to this suit were alleged to have taken place.

The respondent, on the other hand, submitted that the appeal ought to be dismissed, and the decree below affirmed, for the following reasons :—

I. Because it was clearly shown, by the evidence, that *Kundoo Bucha-jee* was the *gomashtah* and general agent of *Chinto Punt ;* and the endorsement of the bills, in the name of *Chinto Punt,* was an act falling within the scope of the general authority with which *Kundoo Bucha-jee* was invested.

II. Because the bills in question having been purchased for *Chinto Punt,* and he having received the money produced by the sale of them to the respondent's firm, it must be presumed that *Kundoo Bucha-jee* had a particular and special authority to endorse these bills in the name of his principal, *Chinto Punt.*

Mr. *Miller,* K.C., and Mr. *Wigram,* K.C., for the appellant.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the respondent.

LORD BROUGHAM :

Their Lordships are of opinion that the respondent, the plaintiff in the Zillah Court, has not made out his case. There was no proof that *Kundoo Bucha-jee* was the *gomashtah,* or had any authority to act as the agent, of *Chinto Punt* ; nor was there sufficient evidence to fix the defendant with the amount of the bills in question. The judgment of both Courts must, therefore, be reversed. The costs in the Zillah Court, and of the present appeal, to be paid by the respondent; but, respecting those of the Sudder Dewanny, we make no order, as the respondent there was supporting the judgment he had obtained.

SURROOPCHUNDER SIRCAR CHOWDRY, *Appellant,*

v.

RAMRUTTON MULLICK - - - *Respondent.**

On Appeal from the Supreme Court at Fort William, in Bengal.

Appeal to Privy Council—Subsequent consolidation with another appeal filed later—Dismissal of first appeal for want of prosecution—Revival of—Practice.

Leave given to restore an appeal dismissed for want of prosecution, the Court below having consolidated it with another appeal in the same cause, which was still pending.

10 February 1837. THIS was a motion for the restoration of an appeal, dismissed for want of prosecution. Previous to the year 1823, *Chowdry* and *Mullick* were engaged in partnership together, in certain speculations in salt; when, disputes arising between them, the appellant, in the month of *April* in that year, filed a bill, in the equity side of the Supreme Court, against the respondent, for an account of the partnership dealings, and certain declarations respecting their several liabilities.

In *January,* of the following year, the respondent filed a cross bill, in the same court, against the appellant, for discovery, and to make him liable in respect of some of the transactions he sought, by the original bill, to fix the respondent with.

Both causes were heard in *February* 1827, when *Chowdry,* the plaintiff in the original cause, was declared equally interested and liable with *Mullick*, the defendant, in all the transactions in question: being dissatisfied with this decision, the appellant petitioned for a rehearing, and that certain variations might be made in the decree, or that the Court would direct issues to be tried, with a view to settle the question of his liabilities.

---

* Present: Members of the *Judicial Committee,*—Mr. Justice Vaughan, Mr. Baron Parke, Mr. Justice Bosanquet, and the Chief Judge of the Court of Bankruptcy.

Privy Councillors,—*Assessors,* The Right Hon. Sir Edward Hyde East, Bart., and the Right Hon. Sir Alexander Johnston.

In accordance with this petition, the causes were reheard in *March* of the same year, and issues directed, as prayed, which were tried on the 16th *June* 1828, when verdicts were found for the defendant, *Mullick.*

The plaintiff, *Chowdry,* conceiving himself aggrieved, and prejudiced by these findings and verdicts, presented a petition of appeal against them on the 15th of *December* 1828, which, by an order of the same date, was directed to be received and filed.

The causes having been set down, upon further directions, came on for hearing on 11th *September* 1828, when the Court decreed, as before, for the joint liability of the appellant, and referred it to the master to take the account of the partnership transactions, on the footing of such interests.

On the 22nd of *January* 1829, the Court varied the minutes of the last-mentioned decree, by adding that the appellant was a party to an agreement entered into by the respondent with the Government, upon the abandonment of certain purchases of salt, and declared his liability thereon.

This decree was passed on the 14th *February* 1829. On the 21st of *July* following, the appellant presented his petition of appeal against this decree, which, on the 25th of *January* 1830, was ordered to be received and filed. No steps were taken by the appellant upon this order, nor did the respondent petition for its discharge; but all proceedings in the cause were stayed under it, and so remained until *July* 1834, when the respondent obtained an order for leave, upon payment of costs, to file a charge with the Master, who was directed to take the accounts as decreed by the order of the 11th *September* 1828.

On the 2nd of *September* 1834, the appellant obtained an order for the allowance of his appeal of the 25th of *January* 1830; and on the 1st of *September* 1835, the Supreme Court made an order upon the petition of the appellant, for the consolidation of the two appeals of the 15th of *December* 1828, and the 2nd *September* 1834.

In pursuance of this order, transcripts of the proceedings were obtained by the appellant, and forwarded to England.

In the month of *March* 1836, the respondent presented a petition to His Majesty in Council, praying that the appeal against the decree of the 14th *February* 1829, might be dismissed for want of prosecution, a year and a day, the period limited for prosecuting appeals, having expired, without the appellant taking any steps therein; and accordingly an order was made on the 29th *June* following, dismissing that appeal, with costs.

On the 1st *September* 1836, the appellant lodged his petition to the King in Council, for the reception of the consolidated appeals, which had been allowed, as before mentioned, by the Supreme Court, on the 1st *September* 1835.

In the month of *October* the appellant heard of the dismissal of his first appeal, and immediately presented a petition to have it restored, setting forth the circumstances above stated, and praying that the order of the 29th *June* might be rescinded, and the consolidated appeals admitted.

The petition was supported by the affidavit of the appellant's agent in this country.

Mr. Serjeant *Spankie*, and Mr. *Robinson*, for the appellant,

Now moved to restore the appeal, insisting that the various proceedings in the Court below had been strictly regular ; and that the leave given, on the 1st *September* 1835, to consolidate the appeal allowed on the 15th *December* 1828 with that of the 2nd *September* 1834, was consistent with the provisions of the Charter of 1774, and the Regulations ;* which require that appeals shall be preferred within six months, but do not limit the time for perfecting the securities. They urged, also, that the dismissal of the appeal from the decree of 1828, was a surprise, and ought not to have been applied for without notice.

Mr. *Pemberton*, K.C., and Mr. *G. Richards*, for the respondent,

Objected to the appeal of 1828 ; which being against the finding of a jury upon issues, ought not to have been allowed at all ; but, at all events, not having been prosecuted for seven years, was virtually abandoned, and could not be revived by the order for consolidating the two appeals.

Mr. Baron PARKE :

We think that the appellant is entitled to be let in to appeal. The rule of this Court is, that a party appealing from an order or decree of the Court below, must present his petition of appeal to the King in Council within a year and a day. This he has, in fact, done : for the consolidated appeals were allowed on the 1st *September* 1835 ; and, on the 1st *September* 1836, the petition of appeal to the King in Council, for the reception of the appeals, was lodged, that is within the prescribed period. The appellant is, therefore, entitled to be let in; but it must be upon the terms of his paying the costs.

---

* See 13 *Geo.* III, c. 63; 21 *Geo.* III, c. 70; and Reg. XVI, A.D. 1797, sec. 2.

MOOFTI MOHUMMUD UBDOOLLAH and another - - - - - - *Appellants,*

v.

BABOO MOOTECHUND - - - - *Respondent.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Practice—Appeals to Privy Council—Consolidation—Conditions justifying.

Two suits having been brought for sums due on the same account, each of which was under 50,000 rupees, or £5,000, held that such suits could not be consolidated for the purpose of appeal, though the original severance of them was contrary to the plaintiff's instructions, and the aggregate amount of both exceeded that amount.

10 February 1837.

THIS was a motion for the consolidation of two Appeals, under the following circumstances. On the 24th *November* 1818, the respondent, *Baboo Mootechund,* filed two separate plaints in the Provincial Court of the province of *Bareilly,* against the appellants. The first suit, which was numbered 152 in the list, was instituted to recover the sum of rupees 19,046. 3. 3. from the appellant *Moofti Mohummud Ubdoollah,* and one *Mohummud Hubeeb-ood-deen,* the amount of an alleged balance of account for the year 1214 *Fusly* (A.D. 1806-7). The second, which was numbered 153, was instituted against the appellant *Ubdoollah* alone, to recover the further sum of rupees 15,430, alleged to be due on a similar account, but exclusive of the sum claimed in the first suit.

The appellant, *Ubdoollah,* alone appeared to both these actions, and having put in his answers, and evidence produced, both suits were heard on the 2nd *October* 1820, and two several decrees made, dismissing the claim of the respondent in either suit with costs.

The respondent appealed in both suits to the Sudder Dewanny of *Bengal,* and additional evidence having been produced, the appeals, which were numbered 2,106 and 2,107, were heard separately on the 23rd *August* 1823, when that Court reversed the judgments of the Provincial Court, and decreed the payment by the appellant of the sums respectively claimed by him.

The aggregate amount of the sums, with interest, as decreed from the date of the institution of the suits, to the period of their decision, amounted to the sum of rupees 54,126 and upwards.

On the 22nd *November* 1823, the appellants presented a petition to the Sudder Court, praying that the two causes might be re-heard, or that an appeal might be admitted to the King in Council, on the ground that they constituted one and the same cause of action, though split into separate demands, and comprised a sum in the aggregate exceeding rupees 50,000, (or £5,000,) the amount required by the Act of Parliament and the existing Regulations,* to entitle them to appeal to England.

On the 27th *November* 1823, the petition came on before the second judge, (Mr. *Courtney,*) when he observed, that it appearing from *Mootechand,* the original plaintiff's own statement, that the demand in either suit arose out of the same transaction, and that his *vakeel* had, contrary to his instructions, converted what was intended for one suit into two, which, though severed, were heard, and decrees made in both Courts at the same time ; and that, as the aggregate amount of the two exceeded the sum required by the Regulations for allowing an appeal ; he was of opinion that the suits were appealable, and that such appeal should be permitted by the Court. This opinion having been subsequently confirmed by the third Judge, (Mr. *Shakespeare*,) the securities were perfected, and the appeal transmitted to England.

---

* 21 *Geo.* III, c. 70, s. 21. Reg. 16, A.D. 1797, sec. 2 & 3, since repealed by 3 and 4 *W.* IV, c. 41, and the order in Council of 10th April 1838. Post Appendix.

The Appellants now presented their petition to His Majesty, praying that the above two causes might be consolidated, and for permission to prosecute the same.

Mr. *Miller*, K.C., Mr. *Wigram*, K.C., and Mr. *Jackson*, for the appellants.

Mr. Serjeant *Spankie*, and Mr. *E. J. Lloyd*, for the respondent.

Mr. Baron PARKE :

In this case there are two distinct causes, and two separate judgments in both the Courts below ; during the proceedings either in the Provincial Court of *Bareilly* or the Sudder Court of *Bengal*, these suits were never consolidated, but were all along treated as separate and distinct actions :—How then can the Court below say that they shall be consolidated for the purpose of the appeal ? The Act 21 *Geo.* III, c. 70, is conclusive. If the Court could consolidate these suits for the purpose of the appeal, by the same rule any number of suits might be consolidated if they represented the same matter. That is contrary to the words as well as the intention of the Act of Parliament. All their Lordships are of opinion that the application cannot be entertained, and the petition must therefore be dismissed with costs.

DOMUN SING, JOOBBA LAL, BAICHOO LAL, and DURP NARAIN - } *Appellants,*

v.

KASEE RAM and TOOLSEE RAM - - *Respondents.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Hindu Law—Joint family—Agreement for partition and payment of debts of family—Creditor suing and recovering debt from one member—Liability of other members to contribute.

Disputes having arisen among the brothers of an undivided Hindoo family, and owners of land, certain agreements were entered into between them, by which their mutual interests and liabilities were declared, and the matters in dispute referred to arbitration. A decree having been obtained by a creditor named in the agreements, against one member only of the family, and the debt recovered from him alone, it was decided by the Courts, and affirmed on appeal, that the other parties were liable to be called upon to contribute in respect of their several shares.

10 February 1837.

THIS was a suit commenced by the respondents, to compel contribution towards the payment of certain debts which had been discharged by *Madho Ram,* their father. The claim was founded upon the obligation of the different parties, as members of an undivided Hindoo family, and the owners of property belonging to it ; and upon certain agreements entered into by the parties themselves.

Dherun Sing, the ancestor of all the parties in the suit, was the father of five sons : *Dundial Sing, Madho Ram, Domun Sing, Kurta Ram,* and *Durriow Sing.* He had, in conjunction with his two brothers, *Munsha Ram* and *Shewun Sing,* acquired zemindary property in several villages in the zillah of *Sarun,* which were registered at the collector's office in the names of *Shewun Sing* and *Dundial Sing.*

In the *Fusly* year 1196 (A.D. 1788-9) *Dundial Sing* died, and the villages were then registered in the name of his son, *Dulsingar Sing* ; but *Madho Ram,* the next eldest brother, took upon himself the management of the revenue arrangements with Government, in the character of *mokhtar,* or agent, for the registrees.

In the *Fusly* year 1206 (A.D. 1798-9) *Dulsingar Sing* died, leaving two widows, but no children.

About this time (1799) serious differences arose between the brothers, from the revenue of the villages having fallen much in arrear, and large loans having been raised from different bankers, in order to make up the deficiency to Government. *Madho Ram* was accused by his brothers of having misappropriated their contributions.

These disputes were, by the agreement of all the surviving brothers, and of *Gouree Dutt,* the *mokhtar* or manager of the affairs of *Dulsingar Sing's* widows, referred to the arbitration of three persons, named *Lala Sheo Persad Sing, Bhya Assa Ram,* and *Bhya Subboor Doss,* who, accordingly, proceeded to investigate the accounts of the parties. Soon after, however, and before they had made any definitive award, *Jubboo Lal* was, at the request of the parties, added as a co-arbitrator with them, and *Lala Sheo Persad Sing* withdrew from the reference. During the time the arbitration lasted, the arbitrators examined the several parties to it, and also drew up various papers, in the form of *ikrarnamahs,* or agreements between the parties, as the grounds upon which their arbitration was to be founded.

The liability of the parties, and the validity of the claim made by the respondents, turned upon these agreements.

The first, dated the 28th of *May* 1799, purported to have been made between all the surviving brothers (*viz. Madho Ram, Domun Sing, Kurta Ram,* and *Dur-*

riow Sing), and after stating that they had caused to be registered in their father's name all the villages they had purchased, and that they had divided among themselves the whole remainder of the estates in four equal shares, and caused them to be registered in their names, it proceeded to declare, that they agreed that, during their father's life, a certain portion of those villages should be appropriated to his use, and that after his death a number of villages should be given to the family of *Dundial Sing* and *Dulsingar Sing*, sufficient for their support, and that the remainder should be divided amongst themselves in equal proportions. They also agreed to redeem certain mortgaged villages, by taking upon themselves the responsibility of the amount payable in equal proportions, and that, when thus redeemed, they also should be divided amongst them, without dispute or objection.

The second bore date the 31st of *May* 1799. It purported to have been made between the four surviving brothers and *Gouree Dutt*, as *mokhtar* of *Dulsingar Sing's* estate, and contained the appointment of *Jubboo Lal*, *Assa Ram*, and *Bhya Subboor Doss*, as arbitrators, to settle their dispute about the payment of the sums borrowed from the bankers, agreeing to abide by their decision.

The third was dated the 11th of *June* 1799. It purported to be made between all the parties last named; and after stating that they had made a division of the landed property, and that they had, of their own free will and consent, agreed to pay *Rajah Burkashore Sing*, *Dwarka Lal*, *Sumbhoo Sahoo*, *Govind Persad*, *Ram Persad Bhuggut*, and *Hurcha Pande*, (who had complained against them, and preferred appeals from the Zillah Court of *Chuprah* to *Calcutta,*) all that might appear equitable to the Courts as well as themselves, in equal shares; proceeded to declare, "That if any one of them should be unable to do so, and the lands of the party complained against should be sold in consequence, that they would make up to him, from their own shares, a share equal to their own; that they would be obnoxious to the eye of the law if any objections should be made by them; and that they would certainly, and without fail, liquidate the bankers' demands."

The fourth also bore date the 11th of *June* 1799, and purported to have been made between all the surviving brothers and *Gouree Dutt.* After reciting the two previous papers, as to the division of the landed property and the payment of the bankers' demands, it declared that they left the other demands against them to the decision of *Jubboo Lal, Bhya Assa Ram,* and *Bhya Subboor Sing.*

The fifth of these papers, also bearing date the 11th of *June* 1799, purported to have been made between the same persons as the two last. It stated that, though they had divided the estates among themselves, the personal property, including cash, still remained in common; that they agreed, without being upon oath, to divide equally among themselves the effects of every kind, and to share alike all the sums which should be found, upon investigation, due to their estate; that the payment of the bankers' demands should, on no account, be delayed until the partition had been effected; that if any dispute arose about the farmed villages or inheritances, either in the mofussil at the collector's office, or the Zillah Court, that they would unite in settling it, and that they would defray the expenses equally among themselves. It further stated, that, after deducting from their several shares the *birt** lands, as a donation in which all were concerned, they would divide the remainder into five equal shares.

After these papers had been drawn up, the arbitration was deferred, at the desire of all the parties, until after the marriage of *Kurta Ram.*

It appeared, also, from the statement of *Jubboo Lal,* taken on oath by order of the Zillah Court, that the proceedings before the arbitrators were further suspended by the departure of *Jubboo Lal* from the place where the investigation was carried on ; and that on his return, some months afterwards, nothing more was said by any of the parties respecting their disputes, or the reference to arbitration, they having, in the meantime, divided the estate among them.

The landed property, which, in the year 1206 *Fusly,* (A.D. 1798-9,) the parties had thus divided among themselves, remained registered in the collector's books in the name of *Madho Ram* alone, until the beginning of the year 1208 *Fusly,* (A.D. 1801-2,) when the several shares of all the parties to the before-mentioned engagements were registered in their respective names.

After this division of the estates, and the registration of the divided shares in the several names of the parties, *Sumbhoo Sahoo,* one of the creditors named in the first agreement of the 11th *June* 1799, obtained in the Zillah Court a decree in his favour, for the sum of rupees 2,300 ; *Dwarka Lal,* another creditor, obtained a decree for rupees 6,646 ; and *Raja Burkashore,* a decree for rupees 38,936. *Madho Ram,* the father of the respondents, paid in cash rupees 2,552 to

---

* *i.e.,* Maintenance ; a designation of lands granted for the maintenance of the grantee.

Sumbhoo Sahoo, in discharge of what was due to him; and, on the 5th of *July* 1802, the Zillah Court caused proclamation to be made for the public sale of the whole of the divided estate, for the payment of what had been recovered by *Dwarka Lal* and Rajah *Burkashore,* amounting together to rupees 45,330. 8.

Upon the issuing of this proclamation, *Domun Sing, Kutra Ram,* and *Durriow Sing,* the three surviving brothers of *Madho Ram,* and *Joobba Lal,* the heir to *Dundial Sing,* the deceased brother, presented a petition to the Sudder Dewanny Adawlut, denying the existence of their joint liability to pay the amount decreed, and disavowing the engagement of the 11th *June* 1799; and thereupon the Sudder Dewanny Adawlut directed that the sale should be confined to the lands of *Madho Ram.* In pursuance of this order, the estate of *Madho Ram* alone was, on the 10th of *January* 1803, sold, in satisfaction of the amount of the decrees obtained by *Dwarka Lal* and Raja *Burkashore.*

In addition to the sum of rupees 45,330. 8. the amount of these decrees, which was thus raised by a judicial sale of the single share of *Madho Ram,* there was another sum of rupees 13,184. 4. forming part of the bankers' demands, intended to be provided for by the agreement of the 11th of *June* 1799, and which was due upon a document under the hand of *Madho Ram* alone, and for the payment of which last-mentioned sum he and his estate alone were upon that document liable to the bankers.

Madho Ram died in or about the year 1209 *Fusly* (A. D. 1801-2); and, on the 12th of *February* 1803, the respondents, his sons and co-heirs, having been admitted to sue *in forma pauperis,* filed their plaint in the Zillah

1837.

DOMUN SING and others *v.* KASEE RAM and TOOLSEE RAM.

Court of *Sarun* against the appellants, *Domun Sing* and *Joobba Lal*, and *Kurta Ram* and *Durriow Sing*, who both died in the course of the proceedings in the Courts below, and were respectively represented by the appellants, *Barchoo Lal* and *Durp Narain*. The respondents, by their plaint, sought to recover, from the original defendants, rupees 36,264. 6½. being four-fifths of the said sum of rupees 45,330. 8. ; and also rupees 10,547. 6. being four-fifths of the said sum of rupees 13,184. 4. which *Madho Ram* had come under a separate engagement to.

The defendants put in a joint answer to the plaint ; they did not deny the execution of the before-mentioned agreements, or the correctness of the statements of the plaint, as to the amount of the sums paid by *Madho Ram*, or for which he had become responsible ; nor was any question made with respect to these sums falling within the terms of the engagement upon which the plaintiffs founded their demand. But the defendants impeached the validity of the agreements into which they and the deceased *Madho Ram* had entered : first, on the ground that, at that time, their father, *Dherun Sing*, was living, and had the control of every thing, and that his children were therefore incompetent to enter into engagements for the division of his property ; and secondly, that *Madho Ram*, previously to the agreements being entered into, had acted fraudulently, by giving to the defendant, *Durriow Sing*, two engagements, the purport of which was represented to be, "that the debt of Rajah *Burkashore Sing*, and the other banker, was at his responsibility, and at that of the five brothers ; and that if *Durriow Sing* entered into any written engagement on that head, it should no way affect him." The defendants alleged that this circumstance was unknown to the other brothers, and was done collusively between *Durriow Sing* and *Madho Ram.* They also stated, that after the agreements had been entered into, and before the divided shares of the real estate had been registered in the separate names of the respective brothers, *Madho Ram* had appropriated the collections to his own use, in consequence of which several villages were sold for arrears of revenue ; and they insisted that the deeds executed by them, without the privity of their father, were completely annulled, by the circumstance of the share of *Dundial Sing,* who was the eldest son, falling short of what it ought to have been in right of eldership, and by the non-registry of the lands, and the alleged sale of several villages to discharge arrears of revenue. The defendants also alleged, that *Madho Ram* had applied to his own use the sum of rupees 32,033. 1. 3. forming the collections of the estate and advances on villages, &c., in common, as well as the sum of rupees 21,000, forming the profits of the farmed villages in *tuppah,** *Bhora,* amounting, in the whole, to rupees 53,033, agreeable to the accounts commencing in 1206 *Fusly* (A. D. 1798-9).

After the respondents had filed their replication to the defendants' answer, the Zillah Court, on the 16th of *June* 1803, directed that an order should be transmitted to *Jubboo Lal,* requiring him to state on oath all the circumstances of the case. A statement in writing was accordingly made by *Jubboo Lal,* in conformity with this order. *Jubboo Lal* also sent to the Zillah Court the several engagements and agreements between the brothers, and various other papers, which had been deposited with him as one of the arbitrators, and had ever since remained in his custody.

---

* A district or sub-division of a pergunna.

On the 26th of *March* 1804, the Zillah Court, considering that the engagement of the 11th of *June* 1799, relative to the payment of the bankers' demands, was a separate and independent agreement, and of unquestionable validity, passed a decree in favour of the respondents for the sum of rupees 47,656. 12. which appeared to be the amount due from the defendants for their contribution towards the sums recovered from *Madho Ram,* or due from him to the bankers.

From this decree the original defendants appealed to the Provincial Court of Patna, and on the 17th of *March* 1806, that Court suggested to the parties the propriety of settling the dispute by a reference to arbitration. The appellants acceded to this proposal, but it was rejected by the respondents.

On the 4th of *July* 1809, the appellants filed some accounts in the Provincial Court for the purpose of showing that in 1206 and 1207 *Fusly,* (A. D. 1798-9, 1800-1,) *Madho Ram* had misappropriated the sum of rupees 52,712. 0. 3. arising from the collections of the entire estate. The Provincial Court considered that, if this alleged misappropriation were clearly established, the appellants ought to be at liberty to deduct four-fifths of the amount from the sum total of the respondents' claim ; and, in order to ascertain the truth of the appellants' representations on this head, the accounts in question were forwarded to the Zillah Court, with a direction to them to appoint an intelligent *Amin** to examine the whole of *Madho Ram's* accounts for the years 1206 and 1207 *Fusly,* in the presence of both parties, and that the report of the *Amin* should be forwarded to the Provincial Court on or before the 15th of *August* 1809.

---

* A provisional native officer.

The appellants, however, though duly and frequently summoned to appear before the *Amin* appointed by the Zillah Court, and to proceed with the examination of the accounts referred to his investigation, refused to do so, and, in consequence of such refusal, the *Amin* was unable to make any report to the Provincial Court beyond a detailed statement of the causes which had prevented his going into the accounts.

On the 5th of *November* 1810, after the Provincial Court had received the statement of the *Amin,* the appellants represented to the Court, that they had declined to appear before the *Amin* in consequence of a message they had received from the respondents, requesting that the business might be brought to a settlement among themselves ; but the truth of this representation was denied by the respondents. The Provincial Court, under these circumstances, considered that the request of the appellants for an examination of *Madho Ram's* accounts, and their objection to the respondents' demand, on the ground of an alleged misappropriation by *Madho Ram,* had been made merely for the purpose of delay ; and on the 5th of *November* 1810, they, by their decree, dismissed the appeal of the appellants, and affirmed the decree of the Zillah Court, and the appellants were ordered to pay the respondents interest upon the sum decreed, at the rate of one *per cent. per* month, as well as all the costs of the suit.

From this decree the appellants appealed to the Sudder Dewanny Adawlut. In their reasons of appeal.

they brought forward a charge of corruption against the *Amin* who had been deputed to investigate the accounts, and alleged that he had acted in collusion with the respondents: they further represented to the Sudder Dewanny Adawlut, that, although they had complained to the Provincial Court of the conduct of the *Amin,* that Court had, notwithstanding, affirmed the decree of the Zillah Court.

The appellants further alleged, that after the Provincial Court had made its decree, one *Isher Dhut,* a relation of all the parties, interfered in the business, and agreed to examine the accounts; that both parties consented willingly to leave the matter to his judgment; and that upon making up the accounts of *Madho Ram* for 1206 *Fusly,* (A. D. 1798-9,) *Isher Dhut* had found a balance due to the appellants, for that year, of rupees 19,414, 7¼., which being deducted from the original claim of the respondents, it was settled that a balance of rupees 27,397. 5½. was justly payable to them by the appellants. The appellants represented, that the accounts for 1207 *Fusly,* (A. D. 1800-1,) were not settled by *Isher Dhut,* in consequence of a dispute having arisen between the respondents, which prevented their attending him, and they therefore prayed that the Zillah Court might be ordered to complete the investigation thus begun by *Isher Dhut.*

The respondents, by their answer to the reasons of appeal, contradicted the statements of the appellants, with respect to the alleged misconduct of the *Amin,* and they stated that, although the appellants had endeavoured to induce them to submit the existing differences to the arbitration of *Isher Dhut,* they had constantly refused so to do.

A further attempt, in the shape of additional reasons, was afterwards made by the appellants, to support their allegation that the respondents had agreed to submit the matter to the arbitration of *Isher Dhut*, and for the same purpose they filed a paper of accounts, which purported to be signed by the appellants and by the respondent *Toolsee Ram*; and also a document, which the appellants alleged to have been written and signed by the other respondent, *Kasee Ram*, acknowledging that he had agreed to accept of rupees 27,397. 5½. as settled by *Isher Dhut*, on account of the decree awarded in the respondents' favour, and of rupees 2,000 more, allowed to him, and that he, the respondent, would make no more objections.

Both of these documents, or at least the signatures of the respondents which appeared upon them, were alleged by the respondents to the spurious. The appellants produced no evidence in support of them, or of any of the statements contained in their reasons of appeal.

On the 30th of *September* 1814, the Sudder Dewanny Adawlut gave judgment in favour of the respondents. But inasmuch as, since the decree of the Provincial Court, the respondents had, upon an appeal, succeeded in reducing the amount of one of the decrees obtained against them by the bankers, by the sum of rupees 1,912. 8., four-fifths of that sum was deducted from the amount which the respondents had in the present suit recovered from the appellants. Subject to this deduction, the decree of the Provincial Court was affirmed, with interest and costs to be paid by the appellants.

From this decree of the Sudder Dewanny Adawlut, the appellants appealed to His Majesty in Council, and

1837.

DOMUN SING and others *v.* KASEE RAM and TOOLSEE RAM.

prayed that the same might be reversed, for the following reasons :—

I. Because the papers of the 11th of *June* 1799, were never intended by the parties to be definitive agreements, but only part of a proposed arrangement which was never carried into effect, and which would have been invalid by the Hindoo law, inasmuch as it proposed to be a partition of an undivided family estate without the sanction or consent of the father of the parties.

II. Because it was inequitable to make the partners of an undivided estate pay the whole amount of the debts discharged by one of their members, without taking an account of the receipts by that member during the period he had the management of the estate, which had never yet been done.

III. Because all disputes between the parties had been settled by the arbitration of *Isher Dut.*

IV. Because, even if the decree of the Sudder Dewanny Adawlut was correct in other respects, it was erroneous in directing a deduction of four-fifths of the amount to which the demand of *Ram Persad Bhuggut* had been reduced on appeal, instead of which it ought to have directed a deduction of four-fifths of the difference between the sum of 1,912 rupees 8., to which it had been so reduced, and the original sum, to four-fifths of which the appellants had been made liable by the decrees of the Zillah and Provincial Courts in respect of it.

The respondents submitted, on the other hand, that the appeal ought to be dismissed, and the decree appealed from affirmed, for the following reasons :—

I. Because the demand of the respondents for contribution towards the payment of the bankers' demands arose upon a distinct agreement, which provided for a division of the real estate, and for the discharge of these demands, and was wholly independent of all or any questions subsisting between the parties in relation to the personal estate of *Dherun Sing,* the common ancestor.

II. Because the appellants failed entirely in establishing a right of set-off, in respect of alleged misappropriations by *Madho Ram,* of the collections of the real estate in 1206 and 1207 *Fusly,* (A. D. 1798-9, 1800-1,) and also failed in their attempt to make out any agreement or consent by the respondents to compromise the suit, or to refer the matter in difference to arbitration.

Mr. *Miller,* K. C., and Mr. *Wigram,* K. C., for the appellants.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the respondents.

Baron PARKE:

Their Lordships are of opinion that the decree of the Court below ought to be affirmed. In this case the action was founded upon an agreement alleged to have been made by the appellants, to pay their equal proportions of a joint debt, effected on a common family property. It is clear that that common family property was divided in 1799, and it is clear that there were the several agreements entered into, and the first question in this case turns upon the meaning of these agreements. If it was the meaning of them that the bankers' claims were to be paid by all the five persons in equal proportions, according to the interest they respectively had in the family estate, and that that was to be done by the settlement of the accounts between the parties, it is clear that the respondents were right in bringing the action against the present appellants for four-fifths of the bankers' account, and that question depends upon the construction of these agreements, which were entered into between the parties, after the reference that took place in 1799.

Now none of their Lordships have any doubt upon the construction of those agreements. It appears that there had been disputes between the family with respect to the property, and that all these parties agreed to refer the matter to certain arbitrators, and while this arbitration was still pending, it appears that they entered into two agreements. One of those agreements is dated the 11th of *June* 1799, that is the first of those agreements entered into between the parties, and in that agreement the five sons allege that they have made a division of the landed property, and they agree to pay the bankers, in equal shares, that is, that each should pay one-fifth of those demands. They further state, that in case any of them should be under an inability to do so, and his lands should be sold in consequence, that from their own shares they would make that good, "and that they will certainly, and without fail, liquidate bankers' demands," therefore those are demands, which, all parties agree, should at all events be liquidated.

Then there comes a separate agreement, in which, after alluding to the demands of the bankers, upon which suits were then pending, they go on to provide, that in case there should be other demands, they would leave them to the decision of the arbitrators, and they agreed to abide their decision with respect to their quota. That is the provision with respect to an ulterior demand.

And then comes the third agreement: and they having again provided, that though they have divided the estates among themselves, the personal property, including cash, still remains in common, agree that all the debts which are due to the estate should be equally divided among them, and they stipulate that the payment of the bankers' demands shall on no account be delayed until the partition be effected. Therefore they, as clearly as possible, say that the engagements with respect to the bankers' demand shall be carried into immediate effect, and shall not be delayed by any division of the family property, or by the settlement of the debts, which may be due to the family, to be divided between them.

It is clear to their Lordships that this was the agreement between the parties—there is nothing to induce us to come to a different conclusion. That being so, the respondents have clearly a right to recover from the appellants four-fifths of all those bankers' demands, unless the appellants can show some other answer to this right.

Now their first answer is, we have a set-off against the respondents, because *Madho Ram,* their father, was indebted to his brothers upon the management of the family concerns; that he received more rents than he had applied, which it was competent to them to make out; but there is not a scintilla of legal evidence of their having such a claim against him: and when the Zillah Court referred the case, it is clear that they never at that time brought forward such a claim; and if they have such a claim, neither the decision of the Court below, nor of this Court, will prevent them from enforcing it ; therefore their appeal must fail on the ground of their not having brought legal evidence of this set-off.

Another ground which they get up is, that it was referred to arbitrators. Now there is no foundation for saying that it was so referred—there is no legal evidence of that, and that also must fail.

With respect to the last reason assigned in the case of the appellants, that the Court below erred in directing a deduction of four-fifths of 1,912 rupees, instead of directing a deduction of four-fifths of the difference, being 1,912 rupees, and the original sum, it is quite clear, (I think,) that there is a mistake in the wording of the decree in that respect, and that the sum was not meant to be reduced to 1,912 rupees, but reduced by 1,912 rupees. It was not likely that so large a demand as 8,000 rupees should be reduced to 1,912, and therefore we must take it that 1,912 rupees were to be struck off 8,000, and then the decree is perfectly right in giving credit to the respondents for four-fifths of all sums : and the result will be that the decree of Sudder Dewanny Adawlut must be affirmed with costs.

KIRT CHUNDER ROY, and others - - - *Appellants,*

v.

THE GOVERNMENT, and CONNOY LAUL THAKOOR, and GOPAUL LAUL THAKOOR - - - - - - - } *Respondents.**

On Appeal from the Sudder Dewanny Court of Bengal.

Bengal Revenue Regulations—Sale for arrears of revenue—Conditions requisite—"Arrears of revenue"—Meaning of—Acceptance of security bond for arrears, if a discharge—Quantum of estate to be sold.

By the Revenue Regulations the Governor-General in Council, upon the report of the Board of Revenue, may order a sale for arrears of a monthly instalment before the close of the year; but in order to warrant that act, there must be an arrear of a previous year, or of a monthly instalment, for which default has been made, after demand by the collector.

A written instrument, or *kistbundy*, for securing the payment of the *kist* by monthly instalments, though usual and advisable, is not *necessary* to entitle the Government to enforce such payment, if the revenue be a fixed monthly *kist* or instalment.

The taking a security bond with sureties for the payment of accumulated arrears by future monthly instalments, will not discharge the liability of the zemindary for such arrears, or preclude the government from proceeding to a sale of the zemindary, if such arrears are not duly liquidated.

No excess in the value of the lands sold, over the arrear of revenue due, will vitiate the sale, the Government having, by Reg. V, A. D. 1812, an absolute discretion to sell either the whole or any part of an estate for arrears, without reference to the probable produce of the sale.

11, 13, and 15 February 1837.

THE original suit in this case was instituted to rescind a sale made for arrears of Government dues, on the ground that the property in question was not liable for the arrears at the time of the sale, and that such sale was oppressive and illegal. The appellants, *Kirt Chunder Roy*, and twelve others, were formerly hereditary zemindars, and joint proprietors of pergunna *Eidilpore*, situate in the zillah of *Dacca Jelalpore*, in the province

---

*Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy.

Privy Councillors,—*Assessors*, The Right Hon. Sir Edward Hyde East, Bart., and the Right Hon. Sir Alexander Johnston.

of *Bengal,* which they held in undivided shares. Under the decennial and permanent settlement, established A. D. 1793, (Sumvit 1200,) by the *Marquis* of *Cornwallis,* the amount of the assessment charged upon the zemindary of pergunna *Eidilpore,* was the yearly sum of S. R. 54,996. 15. On the 16th of *November* 1812, the zemindary was put up to sale at *Calcutta,* by the Board of Revenue, for recovery of arrears of revenue due from the appellants at the end of the month *Bhadoon* 1219, *Bengal San* (23rd *September* 1812, A.D.), and which amounted at the time of the sale to the principal sum of S. R. 6,210. 12., but before the sale a further arrear, amounting, with the above sum, to S. R. 41,000 and upwards, had accrued due, and was to be covered by the proceeds of the sale.

The arrear of S. R. 6,210. 12. consisted of distinct items, one of them being the sum of S. R. 2,499 for instalments due in respect of a prior accumulated arrear of revenue, the payment of which the Government had agreed to receive by certain fixed instalments, and the other being the sum of S. R. 2,711. 12. which remained due on account of the monthly instalments of the revenue for the current year, 1219, B. S. (A. D. 1812), up to the end of the month *Bhadoon* (*September*). *Mohunny Mohun Thakoor,* the father of the present respondents, *Connoy Laul Thakoor* and *Gopaul Laul Thakoor,* attended the sale of the estate at *Calcutta,* and became the purchaser for the sum of S. R. 97,200, the whole of which sum he paid into the treasury, and a deed of sale was, on the 27th of *November* 1812, duly executed to him by the Government.

This sale was made by the Board of Revenue at

Calcutta, under the authority and in pursuance of the Regulations then in force relating to the land revenue, under the following circumstances.

The arrear of revenue, in respect of which the first-mentioned sum of S. R. 2,499 was due, was the balance of the arrears of instalment due on account of former arrears of revenue, which consisted of the following particulars :—1st, of an arrear of revenue due on account of pergunna *Eidilpore*, from 1198 to 1201, B. S. (or 1792 to 1795, A. D.) amounting to S. R. 28,972. 15. 19. 2ndly, of the balance of revenue for the year 1802, B. S. (or 1796, A. D.) amounting to S. R. 15,730. 8. 10. 3rdly, of the balances due for subsequent years up to 1206, B. S. (or 1800, A. D.) amounting to S. R. 54,619. 13. 11½.; and 4thly, of the costs of certain suits instituted by the collector of *Dacca*, against the appellants, for establishing their liability for the aforesaid arrears, from 1198 to 1201, and of the year 1202, B. S.

The liability of the appellants to discharge the arrears from 1198 to 1201, B. S., and the single year of 1202, B. S., was established by two decrees of the Sudder Dewanny Adawlut, dated respectively the 16th of *February* 1803. By which it appeared, that prior to the institution of these suits the appellants had resisted the demand made upon them by the Collector for their arrears, alleging that the zemindary had been under the management of the government and its officers, and that they (the appellants) were therefore not liable to the payment of the arrears of revenue. But it was established by the evidence adduced in those suits, that the appellants (who being joint proprietors, were, by the Bengal Regulation VIII, A. D. 1793, section 23,* incompetent to undertake the personal management of the affairs of the zemindary) had, by their deputies, presented a *durkhast* or application to the collector, dated the 21st *Assar* 1198, B. S. (5th of *July*, A. D. 1791), praying that the management might be committed to a person of their own appointment; that they had entered into an engagement for the payment of the existing balances, according to the assessment, and that one *Kally Persad* was, in compliance with the prayer of the appellants' *durkhast,* appointed *sarbarakar* or manager of their zemindary ; but upon the resignation of *Kally Persad,* at the end of the year 1198, B. S., the appellants being unable to agree upon the appointment of a person to succeed him, the collector, by virtue of the powers vested in him by the 25th section of the above regulation, appointed a manager of the estate, who continued in the management thereof throughout the years in which the arrears of revenue sued for became due. But as the joint proprietors of an undivided estate are at liberty to obtain a partition, and to hold their respective shares in severalty, and have the means in their power of obtaining the separate management of their shares, and as the appointment of a manager by the collector can only be made for the neglect of the joint proprietors, the manager thus appointed was considered as the agent of the proprietors, and they, by law, accordingly bear the expense of the appointment, and are made responsible for the public revenues.* The Sudder Dewanny Adawlut therefore held and decreed in both the above-mentioned suits, that the appellants were liable to the payment of the arrears of revenue which had become due

---

* Since rescinded, *vide* Sec. 2, Regulation XVII, A.D. 1805.

---

* Reg. VIII, A. D. 1793, sec. 25 and 26.

1837.

KIRT CHUNDER ROY and others *v.* THE GOVERNMENT and others.

from 1198 to 1201, B. S., and for the year 1202, B. S. Both decrees were made with costs, to be paid by the appellants.

On the part of the appellants it was stated as an objection, that during the management of the zemindary by the *sarbarakar* appointed by the collector, the accounts of the collections and disbursements for the years 1199, 1200, 1201, and 1202, B. S., had not been explained to them. The Court considered that this explanation ought to have been given, and after decreeing the liability of the appellants to the arrears in question, the Sudder Dewanny Adawlut declared that, after the explanation of the *sarbarakar's* accounts for the years specified, which it was incumbent on the zillah collector to explain to them, or to some person on their parts, if the appellants should refuse immediately to discharge the balance appearing against them, then it was optional with the Collector and Board of Revenue to sell their zemindary, as provided by the Regulations, for the purpose of recovering their amount, as well as the costs of suit incurred by the respondent, the Government.

It was doubtful whether the Court could impose this restriction upon the right of the Government, to recover payment of the arrears, by a sale of estate, because it did not appear that the Collector had any peculiar control or authority over the manager appointed by him; or that, after his appointment, he was considered in any other light than as the agent of the joint proprietors. By Reg. XIV, A. D. 1793, sect. 6, they had their specific remedies against the *sarbarakar,* or managing officer, for any embezzlement or irregularity of accounts, which he might have executed. Whether it was so, or not, the restriction contained in the decrees was removed, by a new arrangement subsequently entered into between the Board of Revenue and the appellants, long prior to the institution of the suit in which the present appeal had arisen, and before the sale, which the appellants complained of, had taken place.

After the year 1202, B. S., the management of the estate was still conducted by a *sarbarakar* appointed by the Collector ; and further arrears accrued due, which, up to the year 1206, B. S. (1799, A. D.), amounted to S. R. 54,669. 13. 11½. These arrears, together with the arrears and costs which, by virtue of the decrees of the Sudder Dewanny Adawlut, before stated, the appellants were liable to pay, amounted to the sum of S. R. 102,902. 3. 12¾. ; the whole of which still remained undischarged in the year 1211, B. S. (or 1804, A. D.). In that year negotiations were carried on between the appellants, and the Collector, and the Government, in respect of those arrears, in which the appellant pressed for an abatement of some part of the demand, on the ground that the manager of the zemindary, appointed by the Collector, had been guilty of embezzlements and mismanagement. The Governor-General in Council did not think it proper to allow of any abatement, but was willing to give the appellants time to discharge the balance. The appellants, however, refused the terms on which the postponement of payment was offered to them ; and, in consequence of such refusal, the Government, on the 9th of *June* 1804, A. D., advertized the estate for sale for the recovery of the amount due.

The order for sale was afterwards rescinded, upon the appellants entering into an engagement, with sureties , to pay the whole of the aforesaid arrears and

1837.
KIRT CHUNDER ROY and others
v.
THE GOVERNMENT and others.

costs (*viz.*, the sum of S. R. 102,902. 3. 12¾.), by monthly instalments, in ten years, beginning with the year 1211, B. S. (1804, A.D.). The engagement entered into by the appellants was by two instruments : one of them a *durkhast,* whereby they acknowledged that the sum of S. R. 102,902. 3. 12¾. was due from them for arrears of revenue up to the year 1206, B. S., and for costs; stating that they were prepared to pay, by instalments, in ten years, and offering the security of the persons therein named for such payment; and they prayed that this arrangement might be acceded to, and that an order should be sent to the Collector to recall the *sarbarakar,* and to give to the appellants the management of their estate, that they might exert themselves, for the purpose of regularly paying up the Government revenues. The other instrument was a memorandum of the balances due, and the amount of the monthly instalments by which they were to be discharged. Both of these instruments were signed by the appellants on the 6th of *July* 1804, before the Board of Revenue at *Calcutta.*

The arrangement thus offered by the appellants was accepted by the Government; and the appellants were, at the same time, informed that, in the event of their failing to discharge their instalments regularly, together with the current *kists,* measures would be adopted for bringing their lands to sale : and the Collector was, by letter from the Board of Revenue, apprised of this, and desired to be particular in reporting to the Board, should the appellants at any time fail in the discharge of their instalments. The persons whom the appellants offered as sureties for the due discharge of the instalments were *Syed Hoosein-ood-deen Mahoomed* and *Govind Churn Ghose,* who, on the 14th of *July* 1804,

A. D., executed a bond for payment of the instalments, according to the terms of the agreement entered into by the appellants ; and they agreed that, in the event of their failing to discharge the instalments, their zemindary and talooks might be sold by the Government for realizing the balance due.

After the foregoing arrangement was completed, and on the 20th of *July* 1804, A. D., the appellants were, under the orders of the Revenue Board, let into the possession and management of their own estate ; and they appointed *Sheo Persad Mujmoodar,* farmer of the zemindary, who held it in farm, under the appellants, from that period till the sale of the estate.

Up to the time when the appellants entered into the above engagement for payment of the Government demand by instalments, no explanation had been given of the account of the *sarbarakars* appointed by the collector for the years 1199, 1200, 1201, and 1202, B.S.; and an application had been made by the appellants, on the 17th of *June* 1803, to the Zillah Court of *Backergunge,* for an order upon the Collector to give the explanation required by the decrees of the Sudder Dewanny Adawlut in that respect. The Zillah Court passed an order to that effect on the 15th of *July* 1803; it appeared, however, that, owing to irregularities which had formerly prevailed in the Collector's office, a full and satisfactory explanation of the accounts could not be given ; and the matter remained in this position at the period when the appellants entered into the before-mentioned arrangement, with the Government, for the payment of the accumulated arrears by instalments.

In pursuance of that arrangement, the monthly instalments were from time to time paid, (whether at the stated and proper times did not appear,) and the payments were made by the appellants' sureties in the names of the appellants; and the receipts given by the Collector for those payments were given with reference to, and by way of, *discharge of the zemindary*. At the end, however, of the month *Bhadoon* 1219, B. S. (*September* 1812, A. D.), there was an arrear due in respect of the instalments of S. R. 2,499, which formed part of the gross sum for which the estate was advertized for sale, and was ultimately sold.

On the 5th *Assin* 1219, B. S. (19th of *September* 1812, A. D.) the Collector of *Dacca* addressed to the Board of Revenue, at *Calcutta,* a letter, wherein he recommended that the lands of defaulters, in payment of revenue, should be immediately advertized for sale, for recovery of arrears up to the preceding month of *Bhadoon* (*September*), on account of the current year 1219, B. S. This letter enclosed several statements of lands of defaulters. Statement No. 1, specified estates, the assessment upon which exceeded rupees 5,000, and comprised the pergunna *Eidilpore,* the assessment upon which exceeded that sum; and the amount of arrear charged against it was S. R. 18,217. 12. ; the particulars of which were stated to be S. R. 15,718. 12., on account balance of revenue for the current year ; and S. R. 2,499, on account balance of revenue for former years, due on *kistbundy*. In reply to this letter, the Board of Revenue, on the 6th of *October* 1812, A. D., ordered the collector, with reference to statement No. 1, to issue the prescribed advertisements, notifying that the lands would be disposed of at the office of the Board of Revenue, at *Calcutta,* on the 16th of *November* then next (corresponding with

3rd *Aghun*) ; and on the 3rd of *November* 1812, A. D., the Board of Revenue acquainted the collector that the Governor-General in Council had authorized the proposed sale.

On the 12th *Katik* 1219, B. S. (26th of *October* 1812, A. D.), the Collector, in obedience to the orders of the Board of Revenue, issued the advertisements of sale, notifying, among other things, that the "sale statement" of the villages in *Dacca Jalalpore* being in arrears up to *Bhadoon* (*September*) 1219, B.S., had been transmitted to the Board of Revenue on the 18th *September* 1812, A. D. ; and that the *mahuls* or districts assessed beyond rupees 5,000, were to be sold, at the office of the Board, on the 3rd *Aghun* 1219, B. S. (16th of *November* 1812) : and that, if the defaulters of the first description discharged their arrears, they would be received at the Treasury until the 25th *Katik* 1219, B.S. (8th of *November* 1812, A. D.), and due notice given of the payments to the Board ; but that no sums would be received *after* that date : and, by the same advertisements, the arrears due on account of pergunna *Eidilpore* were stated to be the aforesaid sum of S. R. 18,217. 12., and to consist of the same items and particulars as before mentioned to have been specified in the Statement No. 1, transmitted by the Collector to the Board of Revenue.

At the date of the Collector's letter to the Board of Revenue of the 19th of *September* 1812, A.D., the amount of payments made by the appellants, on account of the revenues of the current year, due up to the end of *Bhadoon* (*September*), was S. R. 10,601 ; but before the publication of the advertisement of sale, and on the 30th of *September* 1812, A. D., they paid into the Treasury the sum of S. R. 5,008, by which their payments were increased to S. R. 10,710. 12. ; and on the 16th *Katik* (30th of *October*), which was after the publication of the advertisement, but before the expiration of the period limited thereby for the payment of arrears, they paid the further sum of S. R. 4,500, which made the arrear, for the current revenue, S. R. 6,210. 12. ; at which it stood on the 25th *Katik* (8th of *November*), the last day on which defaulters were to be at liberty to make any payments to the Treasury : and the total arrear on that day, including the arrear of S. R. 2,499 due on the instalment bond, was S. R. 8,709. 12. But on the 28th *Katik* (11th of *November*), being only five days before the day fixed for the sale at *Calcutta*, the appellants paid into the Treasury the further sum of S. R. 2,499, and delivered to the Collector an *ikrarnama*, or engagement, signed by two persons as sureties, for the payment of the balance of S. R. 6,210. 12. on the 14th *Aghun* (the 27th of *November*), which was eleven days subsequent to the day of sale.

This *ikrarnama*, which was given on behalf of the appellants, contained an acknowledgment that the sum of S. R. 8,709. 12. was then the amount of the arrears up to the end of *Bhadoon* ; which accorded with the statement of the Collector, after deducting the subsequent payments made prior to the date of the *ikrarnama*.

On the 12th of *November* 1812, the acting Collector communicated to the Board of Revenue, at *Calcutta*, that the balance due on that day, for arrears of revenue from pergunna *Eidilpore*, was S. R. 6,210. 12. ; and that the persons who had executed the last-mentioned security-bond had engaged to pay this arrear on the 27th of that month. The date of the arrival of this letter, at *Calcutta,* was on the 16th of *November* 1812, just before the intended sale. The Board of Revenue considered that to have then postponed the sale, would not have been consistent with the pledge given to the public. They considered, moreover, that the appellants were not, under the circumstances, entitled to indulgence, as there was still remaining unpaid a large *further arrear* of revenue due from them, which had accrued since the end of the month *Bhadoon* (*September*), and was wholly unprovided for. The Board, therefore, in the exercise of their discretion, refused to give their sanction to the proceedings of the Collector.

Accordingly the sale of the appellants' zemindary, which was fixed for the 16th of *November,* took place on that day, in pursuance of the advertisements ; and *Mohunny Mohun Thakoor* was declared the purchaser, at the price of S. R. 97,200, and paid the whole amount into the Treasury. And a deed of sale or conveyance, dated the 27th of *November* 1812, A.D., was duly made and executed by the Government to him.

It appeared, however, notwithstanding the sale and the execution of the conveyance of the zemindary, that, on the 27th of *November,* the balance of S. R. 6,210. 12., which cleared all the arrears up to the end of *Bhadoon* (*September*), was paid into the Collector's treasury, in pursuance of the *ikrarnama* in that behalf ; and the acting Collector, by a letter of that date, informed the Board of Revenue, at *Calcutta,* of the payment ; which they, by their answer to him of the 1st of *December*, disavowed, by apprising him that, as the sale of the estate had taken place, they could not annul that act.

The appellants thereupon impeached the sale, and denied its legality; and, in compliance with the requisitions of Reg. III, A.D. 1793, sect. 2, they, on the 13th of *May* 1813, presented their petition to the Provincial Court of *Dacca,* to be forwarded to the Governor-General in Council, praying for a rescission of the sale, and that they might be restored to their former estate. The Governor-General in Council did not think fit to accede to the prayer of this petition; but directed the appellants to bring their action against the Government, for the purpose of trying the question raised by the appellants as to the validity of the sale which had taken place. The appellants accordingly filed their plaint, in the Provincial Court of *Dacca,* on the 22nd of *March* 1814, against the Government and the purchaser under them, whose representatives were the respondents in the present appeal.

The principal objections urged by the appellants in their plaint against the sale were two, having reference, respectively, to the two items of which the arrear of revenue, up to *Bhadoon* (*September*) 1219, B. S., or sum of S. R. 6,210. 12. was composed.

The first of these objections, which applied to the sum of S. R. 2,499, the arrear of instalments due on account of former arrears of revenue, was that the acceptance, on the part of the Government, of the bond of the 14th of *July* 1804, for the payment of those arrears, had exempted the zemindary from all liability on account thereof, and that no sale could be legally had for their discharge.

The second objection, which applied to the sum of

S. R. 3,711. 12., the arrear for the current year, 1219, B. S., to the end of the month *Bhadoon,* was that the *ikrarnama* of the 11th of *November* 1812, was a virtual payment of all arrears up to the end of that month.

They further insisted, that there being no *kistbundy** fixing the time of payment, regularly signed by the appellants ; the amount of monthly instalments payable by them on account of the yearly revenue of pergunna *Eidilpore,* up to the end of *Bhadoon,* was to be regulated and ascertained by local custom ; and that, by the custom of the place, when no regular *kistbundy* had been signed, only six anas in the rupee were payable up to the end of that month, and that therefore the proportion of the entire yearly revenue which would then be payable, was six-sixteenths, or three-eighths.

After the usual pleadings had been concluded, evidence was adduced by the appellants, to prove the facts before stated, as to the security-bonds, the revenue assessments, and the payments of the arrears up to *Bhadoon.* They also produced documents, to show that the independent talooks of their own pergunna had only been assessed, and payment made, of the proportion of six anas to the end of *Bhadoon* ; that the Government, in cases where security-bonds had been entered into under similar circumstances to that of the 14th of *July* 1804, were in the habit of proceeding against the securities for the exoneration of the principal ; that the Board of Revenue had treated this zemindary as being in possession of securities for payment of arrears ; and that the Bond was in the habit of postponing sales, on engagements being entered into for payment of the arrears for which they were advertised.

---

* A document in the Revenue Department, specifying the periods at which the several instalments of the assessment are to be discharged.

The Government, by their answer, took issue on these several points.

Various documents, and copies of accounts, kept in the Collector's office, were produced by the Government vakeel, in explanation of those brought forward on the part of the appellants : he also put in the two decrees of the Sudder Dewanny Adawlut made in *February* 1803.

The defendant, *Mohunny Mohun Thakoor,* proved the deed of sale to him.

On the 2nd of *December* 1815, the suit came on for decision before the Provincial Court, when the sitting Judge (*George Hatwell,* Esq.) declared, that the estate in question had been illegally sold ; and it was accordingly decreed, that the plaintiffs (the present appellants), the dispossessed zemindars of the pergunna *Eidilpore,* should obtain entry into their inheritance ; and that the whole of the costs should be laid at the defendants' (the respondents') responsibility.

Both the Government and *Mohun Thakoor* appealed against this decree, to the Sudder Dewanny Adawlut, and produced, in addition to the evidence brought forward, various documents relating to the revenues of the zemindary. They also put in a report, dated the 6th of *February* 1816, addressed by the Board of Revenue to the Governor-General in Council, respecting these zemindars, in which it was admitted that no regular *tahood* (account settlement) or *kistbundy* had been executed for the estate, but that the monthly demand had been regulated, in a great measure, by a schedule fixed by Mr. *Armstrong* in 1203, B.S. (A.D.

1797), seventeen years antecedent to the present occurrence ; according to which, with some slight variations, they had continued, and been paid without demur or objection. The report then proceeded to state the custom respecting the necessity for taking *kistbundies,* in the following words :—" We are ready to admit, that a *tahood* or *kistbundy* ought to have been taken, although the settlement being permanent, this form becomes the less necessary : but the incumbents well knew what the instalment was, and indeed paid it some years without demur or objection. The usage in revenue transactions, in the absence of specific engagements, is to have recourse to the rule of the past and preceding years."

The respondents (the present appellants) put in their petitions to the Zillah Court of *Bahergunge,* in 1804, to oblige the Collector to explain the accounts of the *sarbarakar* to them, pursuant to the directions of the Sudder Dewanny of the 16th of *February* 1803.

On the 20th of *December* 1816, the cause came on before the Sudder Dewanny, when the Court, after going very minutely into the various circumstances of the case, and the proceedings of the Provincial Court of *Dacca,* observed, that it was evident that the accounts of the preceding years were settled up to 1211, B.S. agreeably to the *durkhast* of the respondents ; that a regular demand of S. R. 26,319. 12., was made against the estate up to the end of *Bhadoon,* from 1211 to 1219, B.S. ; and that the engagement filed by the respondents, under the conviction of their having defaulted, was rejected by the Board of Revenue, who were fully empowered to decide upon the point. As to the sum, then, of S. R. 3,711. 12., connected with the *kists* up to the end of *Bhadoon,* as seen in the engagements of the respondents, and S. R. 13,210. 12. with those of *Assin* (*October*) and *Katik* (*November*) 1219, which were still undischarged, and remained at the responsibility of the respondents, it was the opinion of the Court, that the sale of the pergunna was altogether regular and legal; that the objection raised by the respondents to the disapproval, by the Revenue Board, of their engagement to pay the just arrears of Government, twelve days after the expiration of that which was fixed upon for the sale, was inadmissible in a court of justice; that the want of a *kabooliat* or *kistbundy* could in no shape bar out the just demands of Government for the revenues, because the right in Government to make the demand upon unexempted lands is indisputable; that the sale of an estate for a non-discharge of the sums so demanded was, therefore, perfectly just; and that the desire to have reversed a sale thus circumstanced, upon the single plea of the non-existence of a *kabooliat* or *kistbundy,* was irregular in the extreme.

It was, therefore, finally ordered and decreed, that the decision of the Fourth Judge of the Provincial Court of Appeal for the division of *Dacca,* given on the 2nd of *December* 1815, in reversal of the sale of the *Eidilpore* estate, be rendered null and of no effect; that a decree be made out in favour of the appellants; and that the whole costs of suit in both Courts (with the exception of the charges of the additional vakeels appointed by *Mohunny Mohun Thakoor,* one of the then appellants) be made payable by the respondents.

The respondents (the present appellants), after having presented a petition for a review of the judgment, which was refused, applied to His Majesty in Council, insisting that the decree of the Sudder Dewanny Adawlut ought to be reversed for the following reasons :—

I. Because the alleged arrear of revenue for which the estate was sold, was not justly due from the appellants.

II. Because the arrears, alleged to have become due for the two months immediately preceding the sale, and subsequent to those in respect of which the sale was made, could not be taken into consideration in order to support the legality of that sale.

III. Because the sale of the zemindary for the purpose of paying the alleged arrears of S. R. 2,499, due on the engagement of *June*, 1804, was not warranted by the agreement between the parties.

IV. Because the Board of Revenue was bound by the Collector's acts in accepting the security for payment of the arrears for which the estate was sold, and subsequently of the sum for which the security was granted.

V. Because the amount of property sold was excessive, and unwarranted by the Regulations.

On the other hand the Government insisted that the decree appealed from ought to be affirmed, for the following reason :—

Because at the time the sale in question took place, there was an outstanding arrear of revenue chargeable against the estate, sufficient to authorize and sustain the sale.

And the respondents, the *Thakoors,* in like manner insisted on the legality of the decree of the Sudder Dewanny, for the following reasons :—

I. Because at the time when the sale in question took place there was an outstanding arrear of revenue

1837.

KIRT CHUNDER ROY and others *v.* THE GOVERNMENT and others.

chargeable against the estate, sufficient in law to authorize and sustain the sale.

II. Because the purchaser at the time of the sale, and at the time he paid the purchase money, had no notice of the objections of the former proprietors to such a sale.

III. Because the prescribed Regulations not being complied with on the part of the appellants, so as to prevent the sale, it could not now be set aside.

Mr. *Miller,* K. C., and Mr. *Wigram,* K. C., for the appellants,

Contended that the sale was illegal, for the reasons assigned; they also relied on the circumstance that no *kabooliat* or *kistbundy* for the payment of the monthly kists have been executed by the *zemindars*; that the sale was made, when in fact, nothing was due, and was within the year, without special authority, that the sale was excessive and oppressive; and, lastly, because the arrear on account of which the sale was made was not occasioned by the neglect of the appellants, but the default of their sureties, who were alone liable. They referred to the following Regulations; I, A. D. 1793, sec. 1, art. 1, 2, 3, 4, and 6; Reg. VIII, A. D. 1793, sec. 2, 3, 20, 23, 25, and 26; Reg. XIV, A. D. 1793, sec. 1, 2, 3, 7, 9, 10, 13, 14, 22, 26, and 48; Reg. III, A. D. 1794, sec. 2, 4, 5, 7, 11, and 12; Reg. V, A. D. 1796, sec. 1, 2, and 3; Reg. VII, A. D. 1799, sec. 1, 22, 23, 28, and 30; Reg. I, A.D. 1801, sec. 1, 2, 6, 7, 8, 9, and 11; and cited *Thori Kishen Sing* v. *Munsub Ali* and others;* and the *Government* and others v. *Bhuchook Sing,*† which latter

---

* 4 Macnaughten, Sud. Dew. Reps. 81.

† 3 Macnaughten, Sud. Dew. Reps. 5.

1837.

KIRT CHUNDER ROY and others *v.* THE GOVERNMENT and others.

case decided that it is essential to the validity of a public sale that the preparatory notice be accompanied by a translation in the current language of the country.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the respondents, the Government.

Dr. *Lushington,* and Mr. *G. Richards,* for the respondents, the *Thakoors.*

The counsel for the respondents were not called upon by their Lordships ; they directed the attention, however, of the Court to Regulation V, A.D. 1812, sec. 1, 24, 25, and 28, which they submitted was conclusive on the validity of the sale.

Mr. Baron PARKE :

18 February.

As this case is represented to be one of great interest to a numerous class of persons in India, their Lordships were desirous of hearing both the learned counsel for the appellants before they gave their decision ; we have now had the opportunity of considering all the arguments which could be adduced in support of the appeal, and of carefully examining the pleadings and proceedings in the native courts ; and as we feel no doubt as to the course we ought to pursue, we think it unnecessary to trouble the counsel for the respondents. We are of opinion that we must recommend to His Majesty to affirm the decree of the Sudder Dewanny Adawlut.

The question is, whether the sale by the *East India Company* to *Mohunny Mohun Thakoor,* of the *zemindary* of *Eidilpore,* was *legal.* Whether, if the Company had a right to sell, they used unnecessary harshness towards the appellants in the exercise of that right, is a point on which it is not within our province to form an opinion. That question must depend upon the general state of the revenue at the time ; the habits and dispositions of the people, and a variety of considerations which can have no place in a court of justice. Our duty is to decide on *legal* rights, and we best discharge that duty when we strictly confine ourselves to its performance.

The right of the *East India Company* to sell depends upon two points :—first, whether there was in this case such an arrear of revenue as to authorize a sale : and secondly, if there was, whether the entire *zemindary* could be sold, in order to satisfy that arrear.

The law on this subject is contained in the Regulations, and is very clearly and distinctly expressed.

The first of these to which it is material to advert, is Regulation XIV, A. D. 1793. That Regulation recites the importance of arming the collector with power to enforce the discharge of the annual revenue, without the assistance of the courts of justice ; making those officers responsible to the parties for the due exercise of their powers. In sec. 1, it states that as the Collectors have in their possession the engagements of the proprietors and farmers, specifying the amount of the annual revenue they have agreed to pay, with the monthly proportions in which it is to be discharged, the collectors cannot suffer by unjust prosecutions : and on the other hand the proprietors and farmers will be able to prevent the powers of the collectors being exercised to their detriment, by performing punctually the engagements they have entered into with the public. It then proceeds to enact, that if the whole, or a portion of the *kist,* or instalment, payable in any month, by a proprietor or farmer of land, shall remain undischarged on the first of the following month, the sum so remaining unpaid shall be considered as *an arrear of revenue.** The Regulation then specifies the powers with which the collectors are armed for the *recovery* of arrears, by causing the defaulter to be confined, and appointing an *aumeen*, or receiver.† And by the 13th section, at the end of the year, if an arrear shall remain due, the Collector is to communicate the amount to the Board of Revenue, who are to report to the Governor-General, and recommend the sale of such a portion of the estate of the defaulter as may be sufficient for the liquidation of the amount: but lands are not to be sold, in any case, without the sanction of the Governor-General in Council. By Reg. VII, A. D. 1799, sec. 23, if the balance due to Government is not liquidated by the close of the year, the Board of Revenue is to report to the Governor-General in Council, and recommend the sale of the lands, or such portion as may be necessary to discharge the amount due. But no part of that Regulation is to be construed to preclude the Governor-General in Council from ordering a sale of land within the current revenue year, in any particular case wherein he may judge it proper to order such sale within a year.‡ If the sale of lands is ordered at *Calcutta,* security to contest the claim must be given to the collector eight days prior to the day fixed for the sale, of which day proclamation is to be made, not less than a month before.

From these Regulations, it is clear that the Governor-General in Council may legally order a sale for the arrears of a monthly instalment before the close of the year; but, in order to warrant that act, there must be an arrear of a previous year, or of a monthly instalment.

---

* Sec. 2. † Sec. 3, 4, 5, 6, &c. ‡ Sec. 23, clause 5.

It is said, for the appellants, that there can be no such monthly instalment, unless there be a written engagement, or *kistbundy,* signed or recognized by the *zemindar,* specifying such instalment, as well as some instrument agreeing for the annual amount; and much stress is now laid on this objection, although it was not brought forward in the Provincial Court. There is no doubt that it is most desirable that the collectors should take, in every instance, a written engagement, signed by the parties to be charged. It appears, by the recital in Reg. XIV, A. D. 1793, that it is intended that he should do so, for his own protection from vexatious suits; and, unquestionably, he ought to do it for the benefit of the *zemindars* also: but although such an instrument was supposed by the Governor-General in Council, in enacting that Regulation, to be likely to exist, its existence is not made, either expressly or by implication, a condition precedent to the right to enforce the payment of the revenue by monthly instalments. If the annual amount of revenue be fixed, and agreed for by the *zemindar,* though not in writing, to be paid by *certain ascertained* monthly instalments, the powers given by the Regulation attach. The *kist* or instalment, in such case, is "*payable monthly,*" within the provisions of the Regulations of 1793; upon this point, the decrees of the Provincial Court and the Sudder Dewanny agree. The Judges of both consider that the want of a written instrument constitutes no objection, provided the monthly instalments be fixed and determined, though those Courts differed in opinion upon the facts as to existence, in this particular case, of that certainty in the amount of the monthly payment which is an essential requisite, in order to authorize a sale within the year.

If that requisite be complied with, and an arrear exist, the portion of the Regulations to which I have referred clearly authorizes a sale, by the Governor-General in Council, within the year. Now the question is, does this Regulation authorize a sale of the whole *zemindary,* or only of such a part as may be reasonably sufficient to satisfy the arrears ; that is, if more than such a portion be sold, is the sale invalid, and does the purchaser acquire no title? A short consideration of other portions of the code of Regulations will place the point beyond doubt.

We have before seen, that the Collectors are to recommend a sale of such a portion only as may be sufficient to raise the arrear. But, by Regulation III, A. D. 1794, sect. 5, the Board of Revenue may cause the lands so specified to be sold, or any other lands which they may deem it preferable to dispose of. By Regulation I, A. D. 1801, sect. 6, the unqualified operation of the rules as to the selection of such portion of the lands of the defaulter as may appear to be sufficient, is said to have operated prejudicially to the public interests, as well as those of the proprietors themselves ; and where the *jumma,* or amount of revenue assessed, does not exceed 500 rupees, the Board is authorized to sell the entire estate ; and where it exceeds that sum, they may still sell the whole ; when, from the best information they can obtain of the value, the surplus over the arrear is likely to be inconsiderable.

1837.
KIRT CHUNDER ROY and others v. THE GOVERNMENT and others.

If the provisions of the Regulations had stopt here, it might well have been doubted whether the intention was not to vest a discretion in the Revenue Board, not capable of being impeached, by a suit in the Courts, to set aside a sale made by them, and invalidate the title of the purchaser; though it seems to have been the opinion of the Court of Sudder Dewanny, in the case cited from 3 *Macnaughten,* p. 5, that a sale effected before 1812 could be set aside on that ground; but all doubt on this question is removed by the enactments of Reg. V, A. D. 1812, sect. 24, which expressly declares: "That the consideration of, and decision on, the expediency of selling the entire estate, or of disposing, in the first instance, of any particular part of it, is hereby declared to reside in the Board of Revenue and Board of Commissioners respectively, subject to the control exercised by the Government, in its executive capacity, in matters connected with the public revenue." Then, by sect. 25, it proceeds to enact, that, "No means existing by which any certain or accurate computation can be formed *a priori* of the real value of any estate, or portion of estate, which may be exposed to sale, for the recovery of arrears of public assessment, or of the adequacy of the price which may be offered for such estate, or portion of estate, it is hereby declared, that sales made at public auction, for that purpose, are not liable to be annulled by the Courts of Judicature, on the ground that the proceeds of the sales have materially exceeded the amount of the arrears due from the proprietor of the lands to Government. The Board of Revenue and Board of Commissioners will be guided, in cases of that nature, by their own discretion; subject, of course, to any instructions with which they may at any time be furnished by the Governor-General in Council."

It would be difficult to find language better calculated to do away with all objections, on the ground of excess, as to the validity of sales made by order of the Revenue Board, under the sanction of the Governor-General, where an arrear existed; and it is impossible to deny that such a provision is founded on just views of convenience and policy: for if sales were to be questioned, and conveyances annulled, by Courts of Judicature, on the ground that too much had been ordered to be sold, according to their view of the value of the estate, no title would be safe, no purchaser would be sure of holding his estate; for nothing could be more doubtful and uncertain than the determination of questions of probable value by the Judges of the Adawlut Courts. All this mischief is obviated by the above Regulation of 1812, by which the discretion as to *quantum* is vested in the Board of Revenue; and sales by public auction, under their authority, are rendered absolutely secure from all objection as to excess.

The law, therefore, is clear, that if there be an arrear of the annual assessment, or of a *fixed monthly kist, or instalment,* of that assessment unpaid on the first day of the following month, the Governor-General in Council may order a sale, and the Board of Revenue may direct the *whole* estate of the defaulting *zemindar* to be sold. That this is the law, is distinctly admitted by the appellants themselves; who, in their answers to the reasons of appeal, acknowledge that, if there be a single defaulted rupee, the authorities may dispose of the estate; always provided that there be a just demand by the Government, and the *zemindar* refuse to answer it.

It remains for us to apply the law to the facts of this case.

And, first, that a sale was ordered by the Governor-General in Council, is undoubted. This fact has not been questioned in either of the Courts below; nor can the point be now raised, that the Governor-General ought to have assigned some special reason for the sale. If such an objection could be tenable under any circumstances, it cannot be allowed at this late stage; inasmuch as if it had been urged in the Court below, it might have been at once disposed of by proof of the fact, that there were such reasons, and that they were assigned in the order.

The only remaining question of fact is, whether there was an arrear of a fixed annual assessment, or of a fixed monthly instalment of such assessment. That the zemindary of *Eidilpore* was assessed at the annual jumma of S. R. 54,996. 15., is undoubted. The ancestors of the appellants, at the time of the annual settlement, gave a *durkhast* for that amount: the appellant stated the same amount as annually due, by a petition to the Collector, in 1811; and the first fact asserted in the appellants' petition to the Governor-General is, that such was the amount of the assessment, and there is no contradictory evidence or question raised on that head.

Was this payable by fixed monthly instalments?

It was contended, on the part of the appellants, that in the absence of a written document, (which, in the Sudder Dewanny, but not in the Court below, they considered to be necessary,) the custom was for six anas out of each rupee, or three-eighths of the entire annual revenues, to become due in the month of *Bhadoon* (*September*), and that on that supposition nothing was in arrear at the time of the sale, which took place on the 16th of *November* 1812. If we assume this mode of calculation, it appears still that there was a small arrear of revenue, both at the time of the proclamation for sale, (the 26th of *October* 1812,) and on the 25th *Katik* (9th of *November*), the last day on which, according to that proclamation, the arrears were receivable at the Collector's Treasury. The sum due in *Bhadoon* would, on the six-ana calculation, be S. R. 20,623. 13. 10½. ; and it appears by the Treasury receipts, that before the 25th *Katik* (9th of *Nov.*), S. R. 20,109 only were actually received, which would leave a balance of S. R. 514 ; but on the 18th of *November* there were paid S. R. 2,499, or, according to the extracts of books of the Collector's proceedings, S. R. 2,400, though the latter is, probably, a mistake ; and the collector is admitted to have had orders from the Government to receive cash for arrears, even after the day mentioned in the advertisements ; and therefore, if this sum of S. R. 2,499 was received in part on account of the arrears of *Bhadoon,* it might be very questionable, if after that receipt, and the notification of it to the Board of Revenue, which arrived on the 16th of *November,* the day appointed, the sale would be legal, so far as it depended upon the arrears due in *Bhadoon* (which, as it will subsequently appear, it does not). But if a portion of the S. R. 2,499 is to be applied to discharge the arrears of the annual revenue due in *Bhadoon,* then another difficulty arises ; there would be an arrear of a portion of the instalment for three months payable upon the engagement entered into by the appellants to Government on the 14th of *July*

1804, and the sale of the zemindary would be lawful for this arrear, if the appellants were bound by that engagement. It was subscribed by them; it admitted the arrears then due to be S. R. 102,902. 3. 12$\frac{3}{4}$., it specified the mode of payment from 1211 to 1219, B. S., inclusive, to be 833 rupees for all the months in the year except the last. These monthly payments were, at all events, *fixed and ascertained,* and there can be no question, that Government did not forego the right of selling the *zemindary*, if default should be made in paying these instalments, by taking, as they did, a bond with sureties, by which the estates of the sureties also were rendered liable for the due payment.

But it is said, on behalf of the appellants, that they were not bound by their engagements of *July* 1804, because it was obtained by a sort of duress, namely, the threat of an illegal sale of the *zemindary* for the whole arrear of a lac of rupees and upwards, due at that time. It is unnecessary to enter into the details of that transaction. If the sale was not legal, the *zemindar* should have questioned it at that time, in due course of law. They did not choose to do so, but entered into an engagement with the Government to pay the arrear in ten years, by which they waived all question as to the arrear being really due, in consideration of a great extension of the time of payment, unaccompanied by any charge of interest. With that engagement they complied for seven years and upwards, and it is quite impossible for any court of justice to allow such a transaction to be now impeached and set aside.

But independently of these considerations, from which it appears that there must have been an arrear of revenue to authorize a sale, even supposing the six-

1837.
KIRT CHUNDER ROY
and others
v.
THE GOVERNMENT
and others.

ana custom of computation to apply, their Lordships have no doubt but that the view taken of the case, by the Sudder Dewanny Adawlut, was correct. Although there were variations in the monthly instalments during the early part of the time, in which the *zemindary* was under the management of the appellants, namely, from 1211 to 1219, B. S. (A.D. 1804 to 1812), yet for the seven last years the sum demanded, up to the end of *Bhadoon,* was always S. R. 26,319. 12., and the several monthly payments, composing that sum, according to the *towjees,* or monthly accounts, except in the year 1216, corresponded exactly : and the *kistbundy* in the Government Office, for that year, agreed with the *towjees* for the other years ; so that there was ample proof of a constant course of uniform payment by fixed monthly instalments for seven years, forming abundant evidence of an agreement between the Government and the *zemindars* for payment of these instalments.

On this view of the case, there was an arrear of the revenue due at *Bhadoon* 1219, B. S., the date of the proclamation of sale, of upwards of S. R. 10,000 ; and at the time of the sale itself, there was still an arrear of S. R. 6,210. 12., comprising three monthly instalments of the old arrears, if those instalments are not to be taken to have been paid by the sum of S. R. 2,499 on the 12th of *November,* and if they were, then the whole of the arrear of S. R. 6,210. 12. was for the revenue of 1219, B. S. up to that month.

The argument for the appellants, that this arrear must be considered as having been paid, because the Collector received on the 12th of *November,* a security for this sum payable on the 28th, cannot avail them. The duty of the Collector was to receive in *cash,* and it is clear from his letter to the Board of the 12th of *November*

1837.
KIRT CHUNDER ROY and others
v.
THE GOVERNMENT and others.

1812, that he understood his duty, and took the engagement subject to the approbation of the Board. If, as suggested, he assured the *zemindars* that they had saved their estate, he went beyond his authority ; but it is not improbable that he meant merely to hold out to them the hope that the security would be accepted, in which case no sale would have taken place. This, unfortunately for the appellants, for reasons into which we cannot inquire, the Government declined to do.

Their Lordships therefore are of opinion, that the sale was, in point of law, valid, and the title of the purchaser unimpeached ; and will therefore advise His Majesty to affirm the decree of the Sudder Dewanny Adawlut, and with costs.

NUNDRAM DYARAM and others - - *Appellants,*

v.

DULA-BHAEE KURPARAM and others - *Respondents.*

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Bombay Regulation I of 1800, *S.* 13—*Limitation of suits*—*Demand and acknowledgment of rights or title*—*Absence of*—*Bar of suit.*

The Bombay Regulation I, A.D. 1800, sec. 13, limiting the right of action to twelve years, include suits on account of land as well as personal actions.

Where, therefore, a suit was instituted for the share of certain lands, some of which were attached to the hereditary office of *Desaye,* and no satisfactory proof was given that any demand had been made in respect thereof within that period, the right of action was held to be absolutely barred.

13 February 1837. ON the 28th of *April* 1820, the appellants filed their plaint in the Zillah Court of *Kaira,* against the respondents and two other persons, as defendants, to recover a moiety or half-share of certain heritable property, consisting of the following particulars: First, the share of the produce of several villages in pergunna *Thanna,* attached to a certain hereditary revenue office under the *Mahratta* Government, called *Desaye.* Second, the income of land assigned by Government for the support of village officers, known as *pussaita* land.* Third, the village of *Jhaleea* in enam.† And, fourth, a portion of the sayer duties or inland customs and taxes of the village of *Ulleena.* The entire income or yearly produce of the one-half share of the several descriptions of property mentioned in the plaint, was stated by the appellants to amount to the sum of rupees 1,130. 2.

The defendants (the respondents) were, at and prior to the time of filing the plaint, in exclusive possession of the entire estate. The district within which the property was situated became part of the British territories in *India* in 1817, previously to which it was under the *Guicowar* Government.

---

* Lands of which the Government share of the revenues is assigned to district and village officers, and to *Brahmins,* or for the support of temples or colleges, and residences of religious persons, &c.

† Gift or grant from the Government.

The title set up by the appellants to the subject of the suit was, that the whole of the estate in question formerly belonged to one *Koober-das,* who held the office of *Desaye,* and was the common ancestor of the appellants and the respondents. By the genealogical table filed by the appellants, it appeared that *Koober-das* had three sons, *Hurjewun,* who died without issue, *Bhookun-das,* and *Chuttoorbhooj-das* : that the appellant *Nundram* claimed as the fifth, and the other appellants as the sixth in descent from *Koober-das* through *Bhookun-das,* and that the defendants were the third and fourth in descent through *Chuttoorbhooj-das.*

At a very remote period, and prior to the year 1765, *Bhookun-das,* or his immediate descendants, quitted the place of their birth, and the district within which the office of *Desaye* was exercised, and settled at *Surat.*

The respondents, by their answers to the plaint, and by their rejoinder, denied the right of the appellants to the share claimed by them in the property in dispute, and insisted that the ancestors of the parties, at a remote period, entered into an agreement in writing, which had been lost or destroyed, that the ancestors and family of the appellants should receive from those of the defendants, out of the revenues and income of the property, a fixed yearly sum of twenty rupees, and that this sum had been received and paid for a period of ninety years, and the respondents afterwards produced divers receipts in confirmation of this statement.

The office of *Desaye,* to which the greater part of the property was attached, is an office under the

Mahratta Government, requiring a performance of various public duties connected with the land revenue. Every sharer in the profits of the office is liable to be called upon to perform those duties. The ancestors of the appellants, by removing from *Ulleena,* and placing themselves in domicile at *Surat,* were beyond the reach of that liability, and avoided the fines and other expenses attending the preservation of the family estate during times of trouble and of change of government.

Upon the trial in the Zillah Court, the respondents produced eight receipts, some of them appearing to be signed by ancestors of the appellants, and others by the appellant *Nundram Dyaram,* for sums received by the parties on account of the twenty rupees per annum, mentioned in the pleadings as the fixed annual payment to which the appellant's branch of the family of *Koober-das* was entitled. Two of these receipts, both dated *Sumvut* 1851 (A.D. 1795), were signed by the appellant *Nundram,* and his signature was deposed to by two of the attesting witnesses, who were examined on the part of the respondents. These receipts recognize the sum of twenty rupees per annum as a fixed and regular payment.

On the 20th of *November* 1821, the Zillah Court, considering that the appellants were clearly established to be joint descendants with the respondents, of *Koober-das,* and that the receipts and evidence adduced by the respondents were not entitled to credit, pronounced its decree in favour of the appellants, and ordered that the costs should be borne by the respondents.

From this decree *Dula-Bhaee Kurparam,* and the other respondents, appealed to the Sudder Adawlut at *Bombay.*

1837.

NUNDRAM DYARAM and others *v.* DULA-BHAEE KURPARAM and others.

The ordinary pleadings upon appeal having been filed by the respective parties, the present appellants, who were respondents in the Sudder Adawlut, examined two additional witnesses, for the purpose of proving payments to them of two sums of money on account of their share of the general fees of the office of *Desaye.*

On the 6th of *July* 1822, the Sudder Adawlut gave judgment in the appeal. The Court expressed its opinion to be, that at so remote a period it was too late to think of disturbing a possession, which neither the present appellants nor their ancestors, for at least three generations, had done anything to uphold; merely on account of the descent from a common ancestor; but that, as the revenue of the village of *Jhaleea* rested on somewhat different grounds, and that some of the *pussaita* land might also have come into the possession of the family by purchase, and thus far would be of the same description of property as the free lands of *Jhaleea* (that is, not held nor possessed in virtue of the office of *Desaye*): it was ordered, that the decree of the Zillah Court be reversed, and the suit of the present appellants dismissed, but without prejudice to any suit they might be induced to file for recovery of a share in the free lands of *Jhaleea,* or of any of the *pussaita* land which might have been purchased independent of the office of *Desaye,* or for the recovery of any other private rights inheritable by them under the Regulations:

From this decree the present appellants (the original plaintiffs in the suit) appealed to His Majesty in Council, relying on the following reasons:

I. That the title of the appellants to the whole of the property claimed by their plaint was satisfactorily established, and was not barred by any law of limitation applicable to the case.

II. That no evidence was adduced by the respondents to prove the alleged release of the undisputed rights of the appellants' ancestors for the payment of twenty rupees a-year.

III. That the appellants never acknowledged that they were not in possession of the emoluments of the office of *Desaye* ; and it was not necessary, to constitute a legal right to a share of these emoluments, that every member of a family should actually exercise the office.

The respondents, on the other hand, submitted that the decree of the Sudder Adawlut ought to be affirmed, and the appeal dismissed, for the following among other reasons :—

I. Because, under the *Bombay* Regulations, the alleged claim and title of the appellants was barred by lapse of time.

II. Because, as to such portions of the property specified in the plaint as belonged to the office of *Desaye,* a strong presumption (not rebutted by the appellants) arose from the evidence, and the nature of the office, that the ancestors of the appellants, at a remote period, relinquished the share which might have devolved upon them by inheritance, in consideration of a fixed annual payment.

III. Because, as to such portion of the property specified in the plaint as did not belong to the office of *Desaye,* there was no evidence of its having formed a part of the estate which descended from *Koober-das,* the common ancestor.

Mr. *Miller*, K. C., and Mr. *Wigram*, K. C., for the Appellants.

Mr. Serjeant *Spankie*, and Mr. *E. J. Lloyd*, for the Respondents.

Mr. Baron PARKE :

There does not appear to have been any recognition of the appellants' title, or any payment on account of the lands in question within twelve years, the period limited by sec. 13 of Reg. I, A. D. 1800. By that section, "That judge is prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it : unless the complainant can show, by clear and positive proof, that he had demanded the money, or that he directly preferred his claim within that period, for the matter in dispute, to a court of competent jurisdiction, to try the demand, and asign satisfactory reason to the Court why he did not proceed in the suit : or that either from minority or other good and sufficient cause, he had been precluded from obtaining redress." This is a sufficient bar to the appellants' right, if they ever had any, to recover.

Of the two witnesses produced before the Sudder Adawlut, one only speaks to any payment being made to the appellants, and that Court, as we think very properly, discredited his testimony. The judgment of the Court below must be affirmed with costs.

PETAMBER MANIK-JEE .. .. .. *Appellant*,

v.

MOTEE-CHUND MANIK-JEE .. .. *Respondent.**

On Appeal from the Sudder Dewanny Court of Bombay.

Practice—Appeal to Privy Council—Concurrent findings of fact—Interference—Evidence—Admissibility—Deed materially altered—Validity Partnership—Proof of.

On a question whether a sub-partnership had been entered into; the validity of which depended on an instrument produced in evidence in the Court below; and upon inspection, as well as the evidence in support of it, pronounced to be invalid; the Judicial Committee in confirming the judgment of both Courts below, were of opinion that they were included under the circumstances of the case from entering upon the examination of the instrument itself, though they fully concurred in the opinion expressed by the Judge of the Zillah Court, and dismissed the appeal with costs.

16 May 1837. THIS was an appeal from a judgment of the Sudder Adawlut of *Bombay*, affirming a decree of the Zillah Court of *Kaira*, whereby the suit of the present Appellant, who was the Plaintiff in the Zillah Court, was dismissed with costs.

The real issue in the suit was, whether a sub-partnership existed between the respondent and the Appellant in respect of a certain share belonging to the Appellant in a banking concern at *Baroda*, which was established in the year A. D. 1805, and closed its affairs in the year A. D. 1823. The appellant's claim upon the respondent (founded on the alleged sub-partnership) was for the share of the debts and losses of the concern, which the appellant had either paid, or for which he was responsible. The respondent denied the existence of the sub-partnership, and the Zillah Court of *Kaira*, in the first instance, and afterwards the Sudder Adawlut of *Bombay,* upon appeal, decided that the appellant had failed to establish it by evidence.

---

* Present: Members of the *Judicial Committee*,—Lord Wynford, Lord Brougham, Mr. Justice Bosanquet, and the Chief Judge of the Court of Bankruptcy.

Privy Councillors,—*Assessors*, The Right Hon. Sir Edward Hyde East, Bart., and the Right Hon. Sir Alexander Johnston.

The appellant's plaint was filed in the Zillah Court of *Kaira,* on the 1st of *March* 1824 ; it set forth that the appellant and one *Rutun-jee Kahan-das* established a bank at *Baroda* on the 23rd of *October* 1805, in which they had equal shares, the business of the concern being carried on in the name of *Nursai Bhaee,* the appellant's son ; that from the day the bank was established the respondent took one-half of the appellant's share, and advanced five hundred rupees, which sum it was alleged was entered in the books of the appellant's firm at the village *Dakoor.* It further alleged that, in consequence of the respondent's refusal to contribute his share of the losses sustained by the concern, the business of the bank was stopped on the 2nd of *November* 1823. The amount of the respondent's share of the total loss for which the appellant represented himself to be primarily liable, was stated to be the principal sum of rupees 10,290. 2. 60., for the recovery of which, with interest, amounting in the whole to rupees 11,745. 0. 85, the appellant brought his suit.

The respondent, by his answer to the plaint, denied the partnership, or that he had ever advanced any money on that account.

Both parties entered into evidence.

The appellant's evidence, so far as it in any degree affected or could be used against the respondent, consisted, 1st. Of an agreement alleged to have been signed by the respondent, which contained an acknowledgment that he had a fourth share in the house at *Baroda,* and the depositions of witnesses in support of that document;

1837.
PETAMBER MANIK-JEE
v.
MOTEE-CHUND MANIK-JEE.

2nd. The appellant's account-books, showing entries of, and relative to, the payment by the respondent of five hundred rupees as his share of the stock of the house at *Baroda*; and 3rd. A letter alleged to have been written and sent, by *Huree Narain*, an *Amin** of police, to the appellant at the respondent's request, containing a confession that the respondent had a fourth share in the house at *Baroda;* and the depositions of witnesses to prove that this letter was, in fact, written and sent at the respondent's request.

The agreement was as follows :—

"I, *Mootee Chund, Manik-jee,* pass this writing to you, *Petamber Manik-jee.* In the money transactions for the district of *Petlad* with the *Patels Jeybhaee, Samul-bhaee,* and *Westa-bhaee, Eshwan-das,* the persons mentioned below have shares, as follows : *Bhut Tricum-jee Wussun-jee* have five and a-half anas, ($5\frac{1}{2}$,) of which *Jumna-das Sunkurlal* and *Bechur Joeta* have shares; *Rutun-jee Kahan das,* who has a shop at *Ahmedabad,* two anas (2) in the rupee; you have five and a-half anas in the rupee, of which I have a fourth share with *Jumna-das Sakurlal,* and *Bechur Joeta.* The remaining three anas (3) in the rupee belongs to *Nursai-bhaee, Petamber-das's house,* in which *Rutun-jee Kahan-das* has half, (one ana and a-half,) and you have half of the remaining ana and a-half, and I the other, being three-quarters of an ana each. In this house I have a fourth share, as is above stated, sixteen anas (16), or one rupee among four persons."

On the back of this agreement a paper was pasted, containing the following endorsement in the hand writing of the respondent.

---

* Commissioner.

"Was divided whatever sum have been received, each partner taken his share; besides this three thousand five hundred rupees (3,500) is due to you by the house at *Dakoor,* which you can take when the money comes from *Poona;* but this money is entered in another book. Until the money arrives from *Poona,* I shall give you interest at the same rate as I usually do. —Dated 7th *Assin-vud* 1874."

This document bore the signature of the respondent, and was attested by Pundit *Huree Narain,* of the village of *Dakoor,* and four other witnesses.

These witnesses, with the exception of Pundit *Huree Narain,* were called and examined by the appellant. They all acknowledged their own signatures as attesting witnesses; but they varied from each other in the version they severally gave of the contents of the paper, and in the detail of circumstances attending the alleged execution of it by the respondent. A summons was issued for his attendance; but by the Nazir's return upon the summons, it appeared that he had then quitted *Kaira,* and had gone to *Baroda.*

On the 21st of *February* 1825, Pundit *Huree Narain* presented a petition to the Court, in which he declared, with reference to the document in question, that in *Sumvit* year 1880, the appellant came to him at *Kaira,* and showed to him a written paper dated 7th *Assin-vud* 1874, in the name, and with the signature of the respondent, and requested that as the document had not been attested by any one, he, Pundit *Huree Narain,* would do so, and that by this means his signature had been obtained.

Pundit *Huree Narain* left Kaira without being examined, and shortly afterwards died. On the 17th of

June 1825, the appellant presented to the Court another declaration in writing, signed by Pundit *Huree Narain,* bearing date at *Dakoor,* 2nd *Kartik-sood* 1881, (*October* 1824,) and which was attested by two witnesses. By this declaration it was stated that the paper or agreement before referred to, was executed by the respondent on the day on which it bears date, and was duly attested by Pundit *Huree Narain.* The witnesses to this declaration deposed to its having been signed by Pundit *Huree Narain* in their presence.

The Zillah Court considered that the evidence of the other attesting witnesses to the respondent's alleged agreement, could not be relied upon as establishing the fact that the respondent executed the paper to which their testimony referred ; and that the paper itself bore evident marks of being spurious and fabricated. The Court submitted the document to the examination of five *Shroffs* or bankers, who were directed to give their opinion whether the four last lines and the signature on the back of it were written in the same hand-writing as the first part ; and if there were any thing else in the document which they should think it necessary to mention, they were to do so. The answer of these five bankers was, that they had carefully examined the document referred to them, and they thought that a part of the paper had been cut off ; that, in their opinion, the writing from the commencement of the document down to the bottom of the first page, was in the same hand-writing, but that the four lines on the back, and the signature, were in a different hand-writing.

The appellant also produced certain books of account, which contained, among other entries, one re-

1837.
PETAMBER MANIK-JEE v. MOTEE-CHUND MANIK-JEE.

lating to the payment of five hundred rupees by the respondent, on account of the stock or capital of the partnership concern.

The Zillah Court, however, referred the books to the examination of the *Shroffs* or bankers, who reported that various erasures and alterations were apparent; that some of the entries affecting the respondent appeared to have ben recently made, and that, in their opinion, agreeably to the custom of bankers, the item relied upon of five hundred rupees credited in the name of the respondent, could not be considered as a proper one.

The appellant endeavoured also to fix upon the respondent an admission or confession made by him to *Huree Narain,* an *Amin* of police, that he had a fourth share in the house at *Baroda.* He was examined on behalf of the appellant; and stated that, on the 1st of *Margasira-vud* 1880 (*February* 1824, A. D.) *Rutun-jee* at ten o'clock in the forenoon, sent for the witness to his house at *Dakoor,* whither the witness proceeded, and found there the respondent, *Kapoor Chund Manik-jee* and *Rutun-jee ;* on which occasion the respondent told the witness that he, the respondent, had a fourth share in the house at *Baroda,* and was also indebted to the appellant in the sum of 3,500 rupees, being the amount of his share of the *Petlad* collections : for the recovering of both of which the appellant had gone to *Kaira,* for the purpose of instituting a suit against the respondent, and that the respondent then requested the witness to call the appellant back, as the respondent wished to settle it ; in consequence of which the witness wrote and despatched a letter to that effect to the appellant. This letter was produced by the appellant, and was verified by the witness *Ka-*

poor-chund, who, together with one *Vujeram,* bearer of the letter, was represented to have been present on the occasion at which the conversation between *Amin Huree Narain* and the respondent took place, was also examined by the appellant. His testimony varied from that of *Amin Huree Narain* in some of the incidents of the alleged meeting at the house of *Rutun-jee* on the 1st of *Margasira-vud* 1880.

The only evidence produced by the respondent was with reference to the disputed document already noticed. The object of the respondent's evidence was to prove an *alibi* at the time when it was alleged he executed the document in question. The Zillah Court, however, placed no reliance upon this evidence.

On the 6th day of *September* 1825 the Zillah Court of *Kaira,* after a full examination of the appellant's documents and the depositions of his witnesses, declared its opinion that the appellant had totally failed to establish the respondent's share in the banking concern at *Baroda,* and accordingly dismissed the suit with costs.

From this decree of dismissal the appellant appealed to the Sudder Adawlut of *Bombay,* by which Court the decree of the Zillah Court was, on the 21st day of March 1826, affirmed with costs.

The appellant appealed from the last-mentioned decree to His Majesty in Council, praying that the decision of the Sudder Adawlut of *Bombay* might be reversed, for the following reasons :—

I. Because the appellant clearly proved that the respondent had a share in the house established under the name of *Nursai-bhaee Petamber-das.*

II. Because the appellant ought to have had an opportunity of proving that the *Shroffs,* to whom the examination of the agreement and of the books of the appellant was referred, were disposed to act with partiality towards the appellant, or to make any other legal objection to those nominated which he was prepared to establish.

III. Because it is no objection to the validity of an instrument that the body of it is written by another person, provided it be proved to have been signed by the party intended to be bound by it after it has been so written; and the irregularities (if any) in the appellant's books constitute no bar to his claim, of which they could have found no legal proof.

The respondent, on the other hand, relied for a confirmation of the decrees of the Courts below, on the following reason :—

That, by the evidence adduced by the appellant in the Zillah Court of *Kaira,* it was not proved that the respondent had any share or interest in the banking-house in question in this appeal.

Mr. *Miller,* K. C., and Mr. *Wigram,* K. C., for the Appellant.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the Respondent.

Lord WYNFORD :

Their Lordships do not think it necessary to call upon the respondent's counsel : this is in fact an appeal against two judgments : the judgment of the Zillah Court of *Kaira,* confirmed by the Sudder Adawlut of *Bombay ;* the latter Court making no observations, but merely confirming the judgment given by the Court below.

The question depends entirely upon facts ; and in a

1837.

PETAMBER MANIK-JEE *v.* MOTEE-CHUND MANIK-JEE.

case coming before this Court, depending upon facts, which have received the judgment of two Courts in *India*, this Court ought not to set aside the last judgment, unless it can see very clearly that that judgment is wrong. It must be most completely satisfied it was wrong and inconsistent with the justice of the case, and against the facts. So far from that being the case in the present case, their Lordships are of opinion that, if those facts had been presented to us in the first instance, we should have given the same judgment as pronounced by the two Courts in *India*. This case depends upon an instrument purporting to be an agreement entered into by the respondent *Motee-chund;* and appears to be subscribed by the respondent, and to be witnessed by the pundit *Huree Narain,* who has alone given evidence to prove that the signature was formally affixed to it, and four other parties; but *Huree Narain* is the only one who says he saw the respondent execute it. With respect to the validity of this instrument, it is enough for us to refer to the judgment of the Court below, without going through the circumstances of the case.

Let us see, therefore, what the Zillah Court says upon the subject: "On examining this paper, it appears that part of the original paper has been cut off, and four lines, just above the signature, written at the back of it: these four lines, and the signature, are written in a different hand-writing from the first part of the document. The Court, in order to have this point well ascertained, thinks it necessary to show it to some bankers; and a question is put to the following bankers, who are there named." Now here, it must be observed, that the Court itself found that instrument had been mutilated in the manner stated

1837.

PETAMBER MANIK-JEE v. MOTEE CHUND MANIK-JEE.

upon their own view of it, without the assistance of the bankers; and that, in our opinion, gets rid of the objection made to these persons having been called in: for we get the fact here stated, by the Judge of the Zillah Court, that the instrument had been mutilated by a part of the document being cut off, and that the four lines on the back of it, and the signature, are written in a different hand-writing from the first part of the instrument.

It is material that we should take notice that only one subscribing witness saw this instrument signed; and, putting that witness out of the question, why may not some very important lines have been cut off from the original document? Cutting the paper off entirely, so that the signature, which was at the bottom of the first paper, might be added, by introducing another paper with those four lines upon it; and the genuine signature, applicable to a different transaction, is appended to this paper, which is in this state: and, but for the evidence of this one witness, there is no testimony in this cause which goes the length of disproving that circumstance. Now is there any court in the world that would receive such an instrument, cut in the manner that this is, without more satisfactory evidence than has been produced? If a plaintiff produces a bond in this country, or any other instrument, which appears to have been altered, the Court will not receive it, or act upon it, till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature: there is no such evidence here, and this is the whole of the case of the plaintiff below.

There is a circumstance which ought to be noticed:

1837.

PITAMBER MANIK-JEE v. MOTIE-CHUND MANIK-JEE.

Huree Narain, amin of police, says the defendant admitted he was a partner in the house ; but we cannot admit that that is sufficient to buoy up an instrument that is beaten down by all the facts that appear.

Under these circumstances, the Court, so far from thinking they have that satisfactory evidence that will enable them to reverse two judgments in *India,* where the Judges had an opportunity not only of hearing the witnesses, which is a great advantage they have over us in that respect, and where they had an opportunity of seeing this instrument ; for though an English Judge might not have understood the writing, the manner in which these alterations were made, might have given us strong reasons for forming a conclusion with respect to this matter ; but under these circumstances the Court is of opinion, that the appeal must be dismissed ; and as this case, on the view we have taken of it, is founded in forgery at the least, and most likely forgery supported by perjury, we think it ought to be dismissed with costs.

KHOORSHED-JEE MANIK-JEE - - - - *Appellant,*

v.

DADA-BHAEE KHOORSHED-JEE -
MEHRWAN-JEE KHOORSHED-JEE and } *Respondents.**

On Appeal from the Sudder Dewanny Court of Bombay.

Practice—Appeal to Privy Council—Concurrent judgments of courts below —When to be interfered with—Will—Construction—Proof—Parsi-testator—Sons entering into possession—Executor under the will acquiescing—Subsequent attempt to disturb possession—Estoppel.

The heirs of a Parsee merchant having, upon his death, taken possession of his shop and continued to carry on his business for nearly two years, the Courts below, refused to disturb their possession upon the production of a will, by which the business was directed to be carried on by the executor for their benefit, until he should think proper to admit them into possession: Held by the Judicial Committee of Privy Council affirming the judgments of the Courts below, that the abstaining from producing the will for the above period, was a consent on the part of the appellant to the respondents' possession of their father's estate and business, and was therefore a virtual compliance with the terms of the will.

Semble—Where an instrument has been admitted to probate, and acted upon in the Courts below, this Court will not enter into the question whether the instrument is sufficiently proved or not.

THE appellant claimed to be the acting executor of *Khoorshed-jee Koonwur-jee,* a Parsee merchant, who resided and carried on business at *Surat,* and was possessed of considerable property both there and at *Bombay.* 22 & 23 June 1837.

The respondents were sons and heirs of *Khoorshed-jee Koonwur-jee.* Upon his death, which happened on the 19th of *September* 1815, they entered into possession of the shop, and continued the business of their deceased father, and in that character they paid and received money, engaged in various transactions, and sued and were sued in the Adawlut.

---

* Present: Members of the *Judicial Committee,*—Lord Wynford, Lord Bougham, Mr. Justice Bosanquet, Mr. Baron Parke, and the Right Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy.

Privy Councillors,—*Assessors,* the Right Hon. Sir Edward Hyde East, Bart., and the Right Hon. Sir Alexander Johnston.

1837.

KHOORSHED-JEE MANIK-JEE *v.* MEHRWAN-JEE KHOORSHED-JEE and DADABHAEE KHOORSHED-JEE.

About two years after the death of *Khoorshed-jee Koonwur-jee,* his son-in-law, *Peshtun-jee Veer-jee,* produced a will and codicil, which he alleged to have been made by *Khoorshed-jee Koonwur-jee,* and given to him by the testator, three days before his death. The will, which was stated to be in the testator's handwriting, was not signed, but purported to be witnessed by three witnesses, and was as follows :

"May the beneficent *Hormuz** always grant me his assistance, and may every thing be done according to this writing which I make, and may no *Saheb*† people, nor my executors, nor the heads or priests of my caste, nor any other great person, alter this my writing in any way. May whatever I write be confirmed ; for which purpose may *Hormuz,* out of his goodness, grant my request, that all which I write may be established.

"The writing of the most humble of the followers of the Prophet *Zerdusht, Khoorshed-jee Koonwur-jee Achawarea.* That the reason of this writing is, that I have drawn out two papers of my circumstances, the first of which is this paper ; and there is another paper, stating the violence, and tyranny, and oppression they have exercised, and how they have ruined me as to thousands of rupees, and in character and reputation, and in every manner of way : from which paper information will be obtained. Concerning that, agreeably to the circumstances, the oppressor should be made answerable, and whatever is due to me by these people should all be made to be paid into my shop : my executors shall receive it from them. And on my decease my executors shall carry on the shop in my name, and whatever there may be of mine, a poor man, shall be kept by the executors on account of the shop; and whatever profit may be produced from the shop, out of that my executors, who are three persons, (*viz. Modee-jee Hormuz-jee Bheem-jee,* and *Khoorshed-jee Manik-jee* Shroff of *Bombay,* and *Peshtun-jee Veer-jee,*) shall carry on my shop. I have two children, but neither of the two have any kind of civilization, and in every respect they are foolish and ignorant, and they throw away all the property like dust, therefore I am entirely helpless as to both of them. If *Mehrwan-jee-bhaee* and *Dada-bhaee* mend their manners it is well, *and, if you think proper,* you may place them in the shop to carry on the business, provided they do not do any thing improper to the value of one dokra; but if they do any thing improper they are not to be *placed.* And if these two brothers live separate, they are to live in my house; for the expenses of these two brothers there shall be furnished in an equal manner out of the produce of my shop. As to *Mehrwan-jee Khoorshed-jee* and *Dada-bhaee Khoorshed-jee,* the first is this: there shall be furnished them a yearly stock of provision, grain, rice, batty of the soockwel and saree sort, and toor, doll, and wheat, and joowar, and lamp-oil, and firewood, and cow-dung, and pickles, and oil, and onions, and saffron, and pepper for mussala. All these shall be supplied in such quantity as the man and wife and one servant may require. Afterwards, if God give them children, then more shall be given when it is required; otherwise, according to what is written, shall be for one year. And the necessary clothes shall be furnished once a year to *Mehrwan-jee* and his wife, and to *Dada-bhaee* and his wife; and if they have any children, they shall also be supplied with clothes. And for the marriage and other ceremonies of the children which they may have, there shall be furnished out of the shop according as may be suitable to a poor man like me. And there shall be given to them each day half a rupee in cash for the daily expenses of fish and vegetables, and ghee, and they may do with it what they please. And of two servants, each brother shall keep one, and give such monthly wages as may be proper ; and they are to keep good humble people, and their wages shall be paid out of the shop. In this manner there shall be paid equally to my *Mehrwan-jee* and *Dada-bhaee.* And in my house there are kept up continually through the thirty days of the month the chaloodian and patroo (or ceremonies for the dead), and they shall be continued always, and wheat for dron ceremony throughout the year, and one egg daily, and a durea of fruit, and the yearly allowance for nosegays, and the yearly allowance for the reading or praying of the *Mobeds,** and what I allow always for the yaes or prayers, &c., according as the Mobed may stay, and do and pray, he shall receive yearly. And in the manner I used to perform the annual festivals for my father and mother and children, and for my deceased ancestors for seven generations, so shall these be performed. And in the manner I used to perform the festivals for the deceased of *Dada Munee's* house, and of my mother's father's house, so shall they be performed : the festival of no one shall be allowed to sink into oblivion. The expenses of the festivals of all the deceased may be laid out by *Mehrwan-jee* if he pleases, and the expenses of these festivals, and of the new

---

* A beneficent spirit according to the Parsee creed.

† Master or lord ; a term of authority or respect.

---

* The ministering priests of the Parsees.

1837.

KHOOR-SHED-JEE MANIK-JEE *v.* MEHRWAN-JEE KHOOR-SHED-JEE and DADA-BHAEE KHOOR-SHED-JEE.

year, shall be drawn by *Mehrwan-jee* out of the shop. And if the two brothers and their two wives will live together in friendship, then they are to eat together, and their clothes and food shall all be furnished together yearly, and they shall eat together ; and for the fish, and vegetables, and ghee of the two, they shall receive one rupee. And if they cannot live together and they do not agree, as this is a bad world, then they may live separately ; and, according as it is written, each shall receive for his own expenses, and they shall eat separately. If they live together, they shall perform together the ceremonies for the dead and of the new year ; and if they live separately and *Mehrwan-jee* perform these ceremonies, he shall receive the expenses ; and if *Dada-bhaee* has to perform them, to lay out the expenses for the ceremonies for the dead and the new year belongs to *Mehrwan-jee,* the elder, and it is fitting for him to do it; the ceremonies for the dead shall thus be performed. And the two brothers and their wives shall eat together, and during the eighteen days of the new year's ceremony they shall eat together. The two brothers shall live in harmony and shall not quarrel or fight. The men do not fight, they always live in good friendship ; but the women, in these days, cannot live in friendship ; therefore if they live together it is very well, otherwise *Mehrwan-jee* shall lay out the expenses on receiving from the shop. And if it cannot be done in this manner, then *Mehrwan-jee* is to observe the new year ceremonies one year, and to perform the ceremonies for the dead ; and if *Dada-bhaee* pleases, he may observe the new year's ceremonies one year. They are to divide each year between them ; one year *Mehrwan-jee,* the next year *Dada-bhaee.* I write this that no one may make any quarrel. I adjure you, *Mehrwanjee* and *Dada-bhaee,* by the beneficent *Hormuz* and the prophet *Zerdusht,* that whether you live together or separately, live in friendship, do not quarrel ; and on the day of the ceremonies for the dead, dine together, as also during the new year festival. Take care, if you alter what I have done, there is the oath of the beneficent *Hormuz.*"

The codicil, which was dated on the day of the decease of the testator, was not in his hand-writing. It was witnessed by two witnesses, and was in the following terms :

"Tuesday 1st *Bhadra-vud* 1871, (19th of *September* 1815,) *Farwardin,* 19th of the 12th month Amerdad *of the Sursum.* To *Modee Hormuzjee Bheem-jee,* and *Hakim-jee Kaoos-jee Roostum-jee,* and *Muncher-jee Khalifa-jee,* written by direction of *Khoorshed-jee Kunwur-jee.*—That, in the presence of you three persons, I do direct to write my last will, according to which you must stand forward and direct to be given. The particulars are : I formerly made a will, in which I have appointed as my executors two persons, *Modee Hormuz-jee Bheem-jee,* and *Khoorshed-jee Manik-jee Surat,* and they shall act according to the writing (or will), and cause others to act. In that writing (or will) I did not give directions about giving any thing to any one, therefore there shall be given to every one according to this my writing ; also the ceremonies regarding my daughters shall be defrayed out of my shop. In the manner I used to do, every thing shall be done.

"My wife's ornaments and clothes, whatever there are, shall be divided and given to three persons : my daughters, *Motee-baee* and *Koonwur-baee,* and my

1837.

KHOOR-SHED-JEE MANIK-JEE
v.
MEHRWAN-JEE KHOOR-SHED-JEE
and
DADA-BHAEE KHOOR-SHED-JEE.

daughter's daughter, *Dossa-baee.* On converting these things into money, make and give separate property to the three persons.

"The notes and papers belonging to my wife, and the debts due to her by people, shall be delivered to my two daughters. They shall be divided and delivered to *Motee-baee* and *Koonwur-baee.* There shall be given according to my writing :

"To my two daughters there shall be given, on my part, property to the amount of rupees 10,000. To the two, separately, as follows :—

"To *Motee-baee,* to the value of ..	Rupees	5,000
"To *Koonwur-baee,* to the value of.. ..		5,000
	Rupees	10,000

"The expenses for my funeral ceremonies shall be paid out of my shop, to the extent of 500 rupees more than were laid out in my wife's funeral ceremonies.

"The expenses for the marriage of my daughter's daughter shall be paid out of the shop.

"At the death of my sister, *Veer-baee,* and of my nephew, *Furjoon-jee,* there shall be paid out of my shop, for the funeral expenses of both, rupees 400, and their funeral ceremonies shall be performed.

"When my nephew's son is married, then there shall be paid rupees 200, to *Furjoon-jee.*"

The codicil then gave several pecuniary legacies to various of the testator's relations, and then proceeded in these terms :

"To *Rutton-baee,* the daughter of my wife's sister, there shall be given property to the amount of 200 rupees, and with the produce thereof she shall be furnished with clothes, and she shall live and eat in my

1837.

KHOOR-SHED-JEE MANIK-JEE *v.* MEHRWAN-JEE KHOOR-SHED-JEE and DADA-BHAEE KHOOR-SHED-JEE.

house as long as she lives ; and when she dies, the 200 rupees shall be laid out in her funeral ceremonies.

"Among my two servants, *Nowshirwan* and *Framjee,* pay 100 rupees at some happy festival."

On the 11th of *August* 1817, the appellant proved this will and codicil in the Recorder's Court at *Bombay,* and on the 30th of *December* 1817, he filed a plaint against the respondent, in the Zillah Court of *Surat,* to recover the property of the testator, which they had succeeded to and possessed themselves of, the value of which he estimated at two lacs of rupees.

The respondents put in separate answers, and in these, and also in the rejoinders which they filed to the reply by the appellant, insisted that the will was invalid, because it was not dated, witnessed, or signed. They also claimed a right to see the original will and codicil, and insisted that they were entitled to the whole of their father's property, as his heirs.

Much evidence was entered into on both sides. The appellant produced the probate copies of the will and codicil, which by an order of the Sudder Adawlut the Court at *Surat* was directed to receive as evidence, the Recorder's Court having refused to part with the original documents. He also produced the correspondence of the respondents with other members of the family, and the *viva voce* testimony of *Hormuz-jee* and *Muncher-jee Khalifa,* the two witnesses to the alleged codicil.

On the part of the respondents it was proved, that since their father's death their names had been used in the Courts of Justice as his heirs, and that they had since that time, paid and received money on account of his estate.

On the 10th of *September* 1819, the Zillah Court

1837.

KHOORSHED-JEE MANIK-JEE *v.* MEHRWANJEE KHOORSHED-JEE and DADABHAEE KHOORSHED-JEE.

gave judgment in this cause, when the Judge stated, that, in the opinion of the Court, "the plaintiff had nothing in his favour but the will ; and even by the will itself, it did not to the Court appear that his case could be supported. It distinctly said, that though the defendants were thoughtless and extravagant, still they were, on altering their course of life, to be admitted to the management of the estate. And who should say that they had not effected this reformation? The plaintiff had not attempted it." The Court accordingly decreed, "That the plaintiff do give in a fair and just account of all property and sums of money which had come into his hands ; and when, after the several legacies directed by the will shall be paid, a general release shall be granted by both parties to each other, and the whole balance of the estate remain in the possession of defendants. Each party to pay his own costs in the first instance, and, on the final settlement, the plaintiff's costs to be deducted and allowed to him."

The appellant appealed from this decision to the Provincial Court at *Surat*, which, on the 18th of *July* 1820, confirmed the decree of the Zillah Court. This latter decree was in the following terms : "In addition to the reasons stated by the Zillah Judge, in which this Court generally concurs, it appearing that the appellant, asserting himself to be an executor of the will of the late *Khoorshed-jee Koonwur-jee*, has omitted or neglected to execute the trust reposed in him for nearly two years after the death of the said *Khoorshed-jee*, which, by section 2, Regulation V, of 1802, he was empowered to have undertaken immediately ; and this delay occurred, notwithstanding his knowledge of the existence of the second will or codicil, dated the 19th of *September* 1815, by which his executorship is recognized. Admitting the first will was not forthcoming for a time, the Court considers that, under the suspicious circumstances in which the documents are produced, the sons of the late *Khoorshed-jee* were justified by section 3, of the same Regulation, in taking possession of the property they are the undoubted heirs to, upon the ground that their father had died intestate, and managing the estate, to all intents and purposes, in as full and complete a manner as they would be legally entitled to do, were no will of their father in existence. And this appears to have been the case, by their having continued in their own names a suit instituted by their father, and obtained decrees thereon in the different Courts up to the Sudder Adawlut, without let or obstruction on the part of the alleged executor. Neither the will or the codicil are, in the opinion of the Court, free from suspicion of having been fabricated ; and this suspicion is not removed by the mere exhibition of the probate of the documents."

The appellant appealed from this decision to the Sudder Adawlut of *Bombay,* which, on the 13th of *August* 1822, made their decree in the following terms :

"The Sudder Adawlut, after a most attentive consideration of the whole of the pleadings and exhibits filed in the several stages of this case, concurring in the views taken of the same by the former Courts, have accordingly determined, that the decision of the late Court of Appeal, passed on the 18th of *July* 1820, confirming the decree of the Zillah Court of *Surat,*

1837.

KHOORSHED-JEE MANIK-JEE *v.* MEHRWANJEE KHOORSHED-JEE and DADA BHAEE KHOORSHED-JEE.

dated the 10th of *September* 1819, be affirmed, the appellant bearing the whole of the costs in the Sudder Adawlut."

The appellant appealed from this last decree to His Majesty in Council, upon the following reasons :—

I. Because the will and the codicil in question were such as a Court of Equity can and ought to execute, and the construction put upon them by the Zillah, and subsequently confirmed by the Provincial and Sudder Adawlut Courts, were at variance with the general intention and express words of the testator.

II. Because the appellant did not in fact, omit or neglect to execute the trusts reposed in him for nearly two years after the death of the testator, as was stated in the decree of the Provincial Court, nor would such omission or neglect, had it actually occurred, have precluded him from asserting his rights, for the benefit of the legatees and other persons interested under the will.

III. Because no regulation or law, justifies heirs in taking possession of property, in direct contravention of the provisions of a will and codicil, which their father had an acknowledged right to make and execute.

IV. Because there was no good ground for suspecting any fabrication of the will and codicil in question, which had been duly proved in the proper Court of Probate, and which no evidence was ever adduced to impeach.

The respondents, on the other hand, relied on the following reasons :—

I. Because the paper propounded by the appellant as the will of the deceased was not a valid will.

II. Because those provisions of the alleged will

1837.

KHOORSHED-JEE MANIK-JEE
v.
MEHRWAN-JEE KHOORSHED-JEE and DADABHAEE KHOORSHED-JEE.

which relate to the deceased's shop and business are void for uncertainty.

III. Because the discretion conferred upon the executors is strictly personal and joint, which was incompetent to the appellant alone to exercise.

IV. Because the respondents, after full knowledge of the will, were permitted to remain in possession and carry on the business after the death of the deceased, and there is no proof of improper conduct on their part, the executors must be taken to have authorized that possession, as directed by the will, and cannot, without cause assigned, resume it.

V. Because the respondents were beneficially entitled, as the sons and heirs of the deceased, to his residuary estate which is undisposed of.

Mr. *Miller,* K. C., and Mr. *Wigram,* K. C., for the Appellant.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the Respondents.

Mr. Baron PARKE:

This case comes before their Lordships in an appeal against the decree of the Sudder Dewanny Adawlut, affirming a decree of the Provincial Court, which decree affirmed a previous decree of the Zillah Court. We have therefore three concurring judgments of the Courts below, upon which we are called upon to advise His Majesty.

The rule upon which this Court has universally acted, is to affirm the judgment, unless they see that the judgment is clearly wrong. In this case, their Lordships after looking at the evidence, and taking great pains upon the subject, cannot pronounce an opinion that these decrees are wrong, and the result will be, that these decrees are to be affirmed.

One question made in the argument to-day was, whether the will and codicil, or either of them, were sufficiently proved. Upon that their Lordships pronounce no opinion. The ground upon which the Courts have proceeded is, that taking the will and codicil to be proved, the plaintiff has no right to institute a suit to be let into possession of the unadministered effects of the testator, and that when the sons were let into possession, there was an end of the right of the executors to interfere. That appears to have been the ground upon which the Courts proceeded, that it was not a power of control to be exercised by the executors from time to time, according to the conduct of the children; but if they (the children) showed a disposition to amend, it was for the executors to consider whether they would let them into the shop; their admission to the management was to be dependent upon their own conduct; but if they were once let into the possession of the concern, the power of the executors was at an end, and the Sudder Court did not see any sufficient reason to differ from the opinion of the Zillah Court, but followed the decree of the Provincial Court in that appeal.

If that be the true construction of the will, it becomes a mere question of fact, whether this executor did let the sons into possession of the shop, and the management of the concern. There appears on the part of the defendants, a certain quantity of proof given of their having continued to act in the administration of the estate of the testator, they continued to manage the concern, they sued for, and paid debts; that is the positive evidence given by the defendants; and then *Hormuz-jee* is examined by the plaintiff, and gives not very clear or satisfactory evidence upon that subject: according to the account, he appears to have said, that the plaintiff so far continued in the management of the concern, that he would not suffer access to a chest, except in his presence; and when he is examined as to the part that the defendants took, and whether the plaintiff himself really acted as vakeel or executor, his evidence shows that the sons were permitted by the executor to take possession and act in the management of the testator's affairs. In another part of the same examination, in answer to a question put by the Court, "Was the business which *Mehrwan-jee* and *Dada-bhaee* managed for a period of four years, right and proper?" he could not deny that they were in the actual management of the business, but he gives an evasive answer, "They do not at present manage business properly." The result that the Zillah Court came to was, that the sons had been admitted completely to the management of the concern. That is one of the grounds they allege for their judgment, and this Court cannot see that the Zillah Court, who were the proper Judges of the matter of fact, upon the testimony produced, have come to a wrong conclusion in that respect. On that ground their Lordships are prepared to advise His Majesty, that the decree of the Zillah Court, and the other decrees that follow it, should be affirmed. This becomes a mere question of fact, whether the vakeels named in the will, admitting it to have been properly proved, admitted the sons to take the actual management, and in that we are of opinion that permission was given, and if they have

1837.

KHOORSHED-JEE MANIK-JEE *v.* MEHRWANJEE KHOORSHED JEE and DADABHAEE KHOORSHED-JEE.

once given that permission, then control is at an end.

Upon these grounds their Lordships think the judgment below should be affirmed, but in consequence of the difficulties in the case, and the great obscurity of the will itself, they think the decree should be affirmed without costs.

GHOLAM RUSSOOL and JAFIR SHAH .. *Appellants,*

v.

MUSSUMAT MUGHLO, MEER TOFYL ALI KHAN, MEER FYZ-OOLLAH KHAN, and SHEIKH RAMZANI .. } *Respondents.*[*]

On Appeal from the Sudder Dewanny Court of Bengal.

Mahomedan Law—Succession—Plaintiff's relationship—Dispute as to—Pedigree—Examination of—Opinion of law officers—Finding arrived after—Claim otherwise barred by limitation—Interference by Privy Council.

The Sudder Dewanny Court having, upon the examination of the evidence of pedigree, and the opinion of the law officers of the Court, reversed the decision of the Provincial Court, in a claim, which was otherwise barred by the Bengal Regulations of Limitation, the Judicial Committee dismissed an appeal from the decision of the Sudder Court under such circumstances with costs.

23 June 1837. THIS was an appeal from a decree of the Sudder Dewanny Adawlut, made on the 5th of *July* 1819, reversing a previous decision of the Provincial Court of *Patna*, of the 23rd of *May* 1819, pronounced in favour of the present appellants.

The subject of dispute was the right of succession to a very large estate, both real and personal, originally acquired by *Meer Ufzul* and *Meer Ushruf*, who held successively high situations in the service of the East-India Company at *Patna*, (or *Azimabad*,) in the province of *Bahar*. After the deaths of *Meer Ushruf's* only son, *Meer Gholam Ghouson*, on the 14th of Safar 1187 Hijra (6th of *May*, A. D. 1773), and of his only daughter, *Mussumat Ameena*, on the 25th of Shaban 1188 Hijra (29th *November*, A. D. 1774,) the estate in question was taken possession of by *Meer Ushruf's* sister, *Beeby Ismut*, and upon her death in 1812, the action was commenced, from the ultimate decision of which the present appeal arose.

---

[*] Present: Members of the *Judicial Committee*,—Lord Wynford, Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Right Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy. Privy Councillors,—*Assessors*, The Right Hon. Sir Edward Hyde East, Bart., and the Right Hon. Sir Alexander Johnston.

Meer Izzut Oollah was the first of the family who left his native country of *Cashmere*, and established himself at *Patna*; he was the son of *Meer Hoossain*, and had three brothers, two of whom died without issue, and from the third, (*Meer Fyz-oollah*,) the appellant *Gholam Russool*, and the respondents *Mussumat Mughlo* and *Meer Fyz-oollah Khant*, were descended.

Meer Izzut Oollah had one son, *Meer Ufzul*, and three daughters.

Meer Ufzul had three children by the same wife, *Syud Dun*, *viz.* one son, *Meer Ushruf*, and two daughters, *Beeby Ismut* and *Mussumat Rowshun*. Upon *Meer Ufzul's* death, his estate became distributable amongst his heirs in sahams or shares, according to the provisions of the Mahomedan law.

Mussumat Rowshun married a person of the name of *Mahomed Sukhi*, and died without issue, leaving her mother *Syud Dun*, her husband *Mahomed Sukhi*, her brother *Meer Ushruf*, and her sister *Beeby Ismut*, surviving her.

Meer Ushruf died on the 17th Jamadi-ul-awal 1186 Hijra (16th *November* 1772 A.D.). At the time of his death he was possessed of large property, which consisted partly of his own acquisitions, and partly of what he had inherited from his father *Meer Ufzul*, and his sister *Mussumat Rowshun*. He left two children, a son *Gholam Ghous*, and a daughter *Mussumat Ameena*, the wife of the appellant *Meer Jafir Shah*.

Gholam Ghous survived his father but a short time, and died on the 14th of Safar 1187 Hijra (6th of *May*

1773 A.D.). His property became divisible on his death, amongst his mother *Zynub,* his paternal grandmother *Syud Dun,* his sister *Ameena,* and his aunt *Beeby Ismut* ; and amongst *Meer Shruf-ood-deen, Meer Zeea-ood-deen,* and *Meer Fukhr-ood-deen,* the sons of *Meer Fyz-oollah,* who were the first cousins according to English computation of his grandfather *Meer Ufzul,* and his own nearest relations in the male line on the father's side at the time of his death. *Meer Fyz-oollah* had another son, *Meer Meeruk,* who was the father of the respondent *Mussumat Mughlo,* and of *Meer Ahsun Oollah* ; but from his having died previously to *Meer Ushruf,* his descendants had not, as was contended on the part of the appellants, any title to the inheritance of *Gholam Ghous.*

Syud Dun died soon after *Gholam Ghous,* possessed of some property, but the exact date of her death did not appear ; her property derived from her husband *Meer Ufzul,* her son *Meer Ushruf,* and her grandson *Gholam Ghous,* became divisible, upon her death, in shares, amongst her daughter *Beeby Ismut,* her granddaughter *Mussumat Ameena,* and a step-sister named *Gullun.*

Mussumat Ameena died on the 25th of Shaban 1188 Hijra (29th of *November* 1774 A.D.). Her property, consisting of what she had inherited from her father, grandmother, and brother, became thereupon divisible in shares, amongst her mother *Zynub,* her husband the appellant *Jafir Shah,* and her nearest relations in the male line on the father's side living at the time of her death.

The whole of the property which had been acquired by *Meer Ufzul* and *Meer Ushruf,* and had become distributable amongst their various descendants and rela-

1837.

GHOLAM RUSSOOL and JAFIR SHAH *v.* MUSSUMAT MUGHLO and others.

tions, was taken possession of, and held by *Beeby Ismut,* in deposit or trust ; for the persons entitled to it, whose claims she was supposed to have recognized by making advances, from time to time ; and by burying in the family tomb, and performing the funeral ceremonies of *Meer Shurf-ood-deen* and *Meer Fukhr-ood-deen,* both of whom came to *Patna,* and died there. The former of these, *Meer Shurf-ood-deen* left no issue ; the latter, *Meer Fukhr-ood-deen,* who died on the 12th Ramazan 1201 Hijra, (27th of *June* 1787 A.D.), left two sons, the appellant *Gholam Russool* and *Meer Ibrahim,* and one daughter, *Beeby Hoormut.*

Beeby Ismut died on the 27th of Rujab 1227 Hijra (4th *September* 1812 A.D.). The house in which she died, and the personal property in her possession, including money, jewels, and plate of very great value, were immediately, upon her death, taken possession of by the respondent *Meer Tofyl Ali.*

On the 25th of *November* 1812, the appellant *Gholam Russool,* who, together with his brother and sister (both at that time residing at *Cashmere*) had succeeded to his father *Meer Fukhr-ood-deen's* shares of the inheritances of *Gholam Ghous* and *Mussumat Ameena,* in the property of *Meer Ufzul* and *Meer Ushruf,* and was also entitled, together with his brother and sister, to a share of *Beeby Ismut's* own property, as one of her heirs, filed his plaint in the Provincial Court at *Patna,* against *Meer Tofyl Ali* and *Sheikh Ramzani,* (the latter steward of *Beeby Ismut,*) whom he suspected to be in collusion with *Meer Tofyl Ali,* praying that he might be declared entitled to his share of the real and personal property left by her.

The respondent *Meer Tofyl Ali* appeared to this suit on the 24th of *December* 1812, and presented a

1837.

GHOLAM RUSSOOL and JAFIR SHAH *v.* MUSSUMAT MUGHLO and others.

petition stating, that he had incurred an expense of 5,500 rupees in burying *Beeby Ismut,* by the instigation of *Meer Fyz-oollah Khan* and *Sheikh Ramzani*; and disclaiming any interest in her property, except so far as he had a claim on it for the 5,500 rupees he had advanced. He annexed to this petition a long list of the property and effects of *Beeby Ismut.* On the same day *Meer Ahsun Oollah* presented a petition to the Court, stating that he was heir to *Beeby Ismut,* and praying to be made a party to the suit. The Court, however, refused the prayer of this petition, on the ground that the petitioner's rights could not be affected by a suit between other parties.

On the 12th of *February* 1813, the appellant *Gholam Russool* filed a supplement petition, for the purpose of bringing before it, as parties to his suit, the respondents *Meer Fyz-oollah Khan* and *Mussumat Mughlo* his mother, and *Meer Ahsun Oollah* and *Mirza-Soobhan Ali.* All the persons, except *Mirza Soobhan Ali,* appeared and put in their answers.

The respondent, *Tofyl Ali Khan,* in his answer to the original plaint and supplemental petition, again asserted that he had borrowed large sums for the funeral expenses of *Beeby Ismut,* at the recommendation of *Meer Fyz-oollah Khan* and *Sheikh Ramzani* ; he admitted that these persons had made over to him the moveable property in her house at *Khana Baugh,* of which he had previously given an inventory, and that some of these articles had been pawned by him, but that the rest were forthcoming at the house at *Khana Baugh* ; he also admitted that *Meer Fyz-oollah Khan* and *Sheik Ramzani* had mortgaged the *mouza* or village of *Secunderpore,* to meet *Beeby Ismut's* debts : and he

1837.

GHOLAM RUSSOOL and JAFIR SHAH *v.* MUSSUMAT MUGHLO and others.

disclaimed any title whatever to the property, except so far as respected the payment of the debts due to himself from it.

The answer of *Meer Ahsun Oollah* insisted that as the plaintiff, *Gholam Russool,* was not mentioned amongst *Beeby Ismut's* relations in a *monaskha* or table of inheritance, filed in a suit instituted many years past against her (*Beeby Ismut*) by *Meer Shurf-ood-deen,* he was not at all related to her; that the real property which he claimed was proved in this former suit, not to have been property left by *Meer Ufzul* or *Meer Ushruf*; that he, *Meer Ahsun Oollah,* and the respondent *Beeby Mughlo,* were the children of *Meer Meeruk,* the son of *Meer Fyz-oollah,* and that he, *Meer Ahsun Oollah,* was entitled to all the property left by *Beeby Ismut*; he contended also, that the plaintiff prevaricated in his plaint, in at one time denominating the property in litigation as being left by *Meer Ufzul* and *Meer Ushruf*; and at another, as being property left by *Beeby Ismut,* and he insisted that if it was the property of *Meer Ufzul,* the whole of his heirs were barred by the Bengal Regulations of Limitation, (Regulation III. of 1793, sec. 14, and Regulation II. of 1805;) and that, if it was established that the whole of the property in litigation were effects left by *Meer Ufzul* and *Meer Ushruf,* the calling the whole of it property left by *Beeby Ismut* was sufficient proof that the plaintiff *Gholam Russool* was not of kin to her.

The respondent *Sheikh Ramzani,* in his answer, denied that he was in possession of any part of the property in dispute.

The respondents *Meer Fyz-oollah* and *Mussumat Mughlo* put in a joint answer, in which they generally denied, that plaintiff *Gholam Russool* was heir

1837.

GHOLAM RUSSOOL and JAFIR SHAH v. MUSSUMAT MUGHLO and others.

or entitled to the property left by *Beeby Ismut*, and they also denied that they were in possession of the property.

Mirza Soobhan Ali, the remaining defendant to this suit, was in the criminal gaol at the time it was necessary for him to put in his answer. He, however, was permitted to file a petition, in which he stated that he was step-son to *Meer Shurf-ood-deen*, who had on his marriage with his (the defendant's) mother, settled on her a lac of rupees and 10,000 red dinars ; that he (defendant) and his brother had, on their mother's death, demanded the sum of *Meer Shurf-ood-deen*, and that he being unable to pay it, had executed an *ikrar-namah*, or deed of settlement, to them, by which he covenanted to pay it out of his share of the inheritances of *Meer Ushruf*, *Gholam Ghous*, and *Mussumat Ameena*, for the recovery of which he had instituted a suit against *Beeby Ismut*, or that if he should die they should succeed to his claims on these inheritances ; that *Meer Shurf-ood-deen* had died, and therefore that the defendant and his brother were entitled to recover from the effects of *Meer Shurf-ood-deen*, which were illegally in the possession of *Beeby Ismut*, the amount of the marriage settlement made on their mother.

The appellant *Gholam Russool* put in a replication to these answers, in which, after mentioning that the respondent *Tofyl Ali Khan* had quitted the country, and carried off with him the greater part of the jewels and other personal property in dispute, he urged that *Meer Ufzul* and *Meer Ushruf* had acquired the property ; that he, as the son of *Meer Fukhr-ood-deen*, was the cousin of *Beeby Ismut* ; that *Meer Ahsun Oollah* was born of a slave girl, and that his father *Meer Meeruk* died during the lifetime of *Meer Ushruf*, and before the

1837

GHOLAM RUSSOOL and JAFIR SHAH v. MUSSUMAT MUGHLO and others.

demise of *Meer Gholam Ghous* and *Mussumat Ameena,* and was therefore shut out of their inheritance. He pointed out that the dismissal of the action brought by *Meer Shurf-ood-deen* against *Beeby Ismut* could not affect him, who was not a party to it, and he contended that Regulations III. of 1793, sec. 14, and II. of 1805, did not affect his rights to the property of *Meer Ufzul,* as his father and uncles had joined in the ceremonies of marriage and lamentations, and had lived together as claimants of their shares.

The respondents *Meer Ahsun Oollah, Meer Fyz-oollah Khan, Mussumat Mughlo,* and *Sheikh Ramzani,* put in a joint rejoinder, and the other respondents put in separate rejoinders to this replication. In these rejoinders the parties relied upon the same grounds as they had respectively taken in their answers.

The appellant produced a genealogical table of his family and *monaskhas,** or paper of tables showing the manner in which the property of *Meer Ufzul, Beeby Rowshun, Meer Ushruf, Gholam Ghous, Syud Dun,* and *Mussumat Ameena,* became distributable according to the Mahomedan law upon their respective deaths. This document was drawn up on the 4th of Shawal 1199 Hijra (8th of *September* 1785 A.D.,) by the *Moofti Syed Hoossain,* and the truth of the facts stated in it was attested by the admission and declaration of *Meer Ahsun Oollah.* He also produced witnesses to prove his descent from *Meer Hoossain,* the founder of the family, and his relationship to the various members of it ; a share in whose inheritance he claimed in the manner above mentioned.

The defendants to this suit put in two *monaskhas.* They also produced a deed of purchase by *Beeby Ismut* of the *mouza Secunderpore* on the 21st of Shaban 1202 (16th of *June* 1788 A.D.), in order to show that it did not form part of the property left by *Meer Ufzul* and *Meer Ushruf*, and the judgment in the suit decided in the year 1790 between *Meer Shurf-ood-deen* and *Beeby Ismut*. They also called witnesses to disprove the appellant *Gholam Russool's* relationship to *Beeby Ismut*.

---

*Tables of inheritance exhibiting the proportions of the estate payable to the sharers and residuaries according to the Mahomedan law.

Before the cause was decided, the appellant *Meer Jafir Shah Khan* presented a petition on the 18th of *May* 1815, praying that he might be declared entitled to his wife *Mussumat Ameena's* share of the effects in litigation.

On the 23rd of *May* 1815, the judge of the Provincial Court made his decree in this cause. The decree, after reviewing the whole of the evidence adduced on both sides, proceeded in these terms, "It is therefore proved by all the pleadings, that, as is inserted in the genealogical table which is exhibited in the cause, the plaintiff is of kin to *Meer Ufzul* and *Meer Ushruf* deceased, and of the late *Beeby Ismut*. It further appears, that his title to the effects which are in litigation is good, to the extent mentioned in the *monaskha*, the correctness of which has been ascertained by the answer given in by *Kazi* of the Court."

Judgment therefore was given, "that the cause be decreed in favour of the plaintiff; that the defendants make good to him from the property which was acquired by *Meer Ufzul* deceased, 30,230 *sahams*,* and from the effects left by the said late *Meer Ushruf* 6,867 *sahams*, agreeably to the portions made mention of in the *monaskha*, for this portion of *sahams*, and that the plaintiff be put in possession of the same."

---

* Shares.

1837.

GHOLAM RUSSOOL and JAFIR SHAH *v.* MUSSUMAT MUGHLO and others.

And—"As *Meer Jafir Shah,* an intervenient claimant, who is husband of *Mussumat Ameena,* daughter of the late *Meer Ushruf,* has presented a petition, praying that his right and title be inquired into, that he might receive his portion ; and as in the *monaskha* which is filed in the cause, his right and title is recognized agreeably to the *furrais-oolla,** it appears fit to award to this intervenient claimant what he is entitled to; and as by a perusal of the judgment given in cause No. 2,385 of the file of the Court of Appeal, bearing date the 5th of *September* 1810, in which *Shah Mahomed Ali* was appellant, and *Rajah Chutter Sing* was respondent, the decision being given by a competent Court consisting of two of the members of this Court, it appears that to *Beeby Nunhee,* who was an intervenient claimant in that cause, was awarded her portion of the property : it is therefore further ordered, that *Meer Jafir Shah,* also the intervenient claimant in the present action, receive 23,895 *sahams* from the effects left by *Meer Ufzul,* and 14,580 *sahams* from the property left by the deceased *Meer Ushruf,* as is inserted in the *monaskha* which has been exhibited by the plaintiff."

"All the costs of the parties (with the exception of one-fourth of the fees of vakeels who are for the intervenient claimants, which fourth shall be paid by the claimants respectively) shall be paid by defendants."

The present respondents, together with *Meer Ahsun Oollah,* appealed from this decision to the Sudder Dewanny Adawlut. Before, however, the appeal was determined, *Meer Ahsun Oollah* died, and the present

---

* The Law of inheritance as prescribed in the Koran.

1837.

GHOLAM RUSSOOL and JAFIR SHAH v. MUSSUMAT MUGHLO and others.

respondent, *Mussumat Muglo,* established herself to be his heir.

The respondents (the present appellants) produced before the Sudder Dewanny Court the additional evidence of a decree in a suit instituted in the Provincial Court at *Patna* by *Meer Juwad Ali,* as one of the heirs of *Zynub,* the widow of *Meer Ushruf,* against all the respondents in this case, and *Baboo Korwulaput,* for the purpose of recovering from them his proportion of her share in the property left by *Meer Ushruf* and *Meer Ufzul.*

The decision in that cause, which was made in accordance with the *monaskha* filed by *Gholam Russool* in the present case, awarded a share of the property to the heirs of *Meer Juwad Ali,* who had died during the pendency of the suit. They also produced two depositions which had been sworn by *Meer Ahsun Oollah* before a magistrate at *Patna,* in some proceedings he was taking in 1812 and 1813 against *Mirza Soobhun Ali,* for the recovery of part of the property in dispute, which that person had taken forcible possession of.

On the 23rd of *June* 1819, the Sudder Dewanny Court made their decree, by which, after commenting on the facts of the case, they declared their opinion, " that seeing the effects left by the said *Meers* came into *Beeby Ismut's* possession, and remained in her grasp and enjoyment without molestation, for a very long period ; considering therefore the length of period, the property, according to the Regulations, had become the private property of *Beeby Ismut,* and the effects left by her should come to her heirs, who had proved their being so. No person who might be of the offspring of *Meer Ufzul* and *Meer Ushruf* had any

1837.

GHOLAM RUSSOOL and JAFIR SHAH *v.* MUSSUMAT MUGHLO and others.

claim on the property left. Further, as *Gholam Russool* had not established his being heir, therefore his claim was unworthy of admission by the Court ; but as the second judge of the Provincial Court had in his decree which he gave in favour of *Gholam Russool,* awarded to *Meer Jafir Shah,* husband to *Mussumat Ameena,* (which latter person indeed, died thirty-nine years before *Beeby Ismut's* dissolution, and who never took possession of the effects left by *Meer Ushruf* her father) a share of the property, it therefore became necessary to put the following questions to the law-officers of the Court : 1st. Did any part of the property left by *Beeby Ismut* come to *Meer Jafir Shah* by any right and title he might have, by reason of being husband to *Mussumat Ameena* his late wife, or would the said property left come to the heirs only of *Meer Meeruk,* who had established their being heirs to *Beeby Ismut?* 2nd. Seeing *Beeby Zynub* died thirty-eight years before the death of *Beeby Ismut,* did any thing of the effects left by *Meer Ufzul* and *Meer Ushruf,* which came into *Beeby Ismut's* possession, and had been left as aforesaid by the said lady, come separately to *Meer Juwad Ali,* son of the said *Zynub's* sister, although other heirs of *Beeby Zynub* exist, after *Beeby Ismut's* death or not?"

The law-officers of the Court returned the following answers to these questions. 1st. "*Meer Jafir Shah* (who is husband of *Beeby Ameena,* and *Beeby Ameena* is daughter of the brother of *Beeby Ismut,* and has died before the demise of *Beeby Ismut*) is not, by reason of any right or title he may have as husband of *Beeby Ameena,* entitled to any part of the effects left by *Beeby Ismut,* and the whole and all of the effects left by *Beeby Ismut* aforesaid come to the male issue of *Meer Meeruk*

1837.

GHOLAM RUSSOOL and JAFIR SHAH v. MUSSUMAT MUGHLO and others.

aforesaid, who are of kin to *Beeby Ismut*, and may have been living at the time of *Beeby Ismut's* death, and the property does not come to the offspring on the female side of the said *Meer Meeruk*, who may be uterine relatives to *Beeby Ismut*, excluding the male issue of *Meer Meeruk*." 2nd. "*Meer Juwad Ali* is not entitled to any part of the effects left by *Beeby Ismut*."

On the 5th of *July* 1819 the Sudder Dewanny Adawlut made their final decree. The latter part of which was in these terms ; "Seeing in the proceedings of this Court, bearing date the 23rd of *June* of the current year, the members of this Court were of opinion that *Meer Gholam Russool* had failed to establish his being heir, and that therefore his claim was not admissible by the Court ; wherefore, taking into consideration the circumstances set forth above, the decision given by Second Judge of the *Patna* Provincial Court, dated the 23rd of *May* 1815, in favour of *Meer Gholam Russool*, and the award of 38,475 sahams to *Meer Jafir Shah*, husband of *Mussumat Ameena*, appear improper and such as should be reversed. The final order and decree therefore is, that the decision of the said Provincial Court bearing date as has been mentioned above, be reversed and annulled, and that a decree be given in favour of appellants, and that the whole of the costs of suit on both sides of this and of the Provincial Court be answered by the respondents ; and should respondents, by reason of the Provincial Court decree being carried into execution, be in possession of the effects in litigation, in that case, by carrying the present decision into execution, the same shall be withdrawn from their possession, and be given into the deceased *Meer Ahsun Oollah's* heirs' possession, who was heir to the said *Meer Meeruk*, together with the

1837.

GHOLAM RUSSOOL and JAFIR SHAH v. MUSSUMAT MUGHLO and others.

accounts (wasilat) for the season during which they were put out of possession, to the period at which they shall have been put in possession thereof."

From this Decree *Gholam Russool* and *Jafir Shah* appealed to His Majesty in Council, praying that the Decree of the Sudder Adawlut might be reversed for the following reasons :—

I. Because the shares in the property in litigation which were allotted to the appellants respectively by the decree of the Provincial Court, were such as they were justly entitled to according to the Mahomedan law.

II. Because even if the appellants were not entitled to those shares for the reasons assigned in that behalf, by the Sudder Dewanny Court, still the Appellant *Gholam Russool* was equally entitled with *Ahsun Oollah* to a share in the property left by *Beeby Ismut,* to whom he stood in the same degree of consanguinity as *Meer Ahsun Oollah.*

The respondents, on the other hand, submitted that the appeal ought to be dismissed and the decree affirmed for the following reasons :—

I. Because the appellant *Gholam Russool* has claimed, or from the tenor of his pleadings and proof must be held to have claimed, a share of the effects and property in dispute as heir to *Meer Ufzul* and *Meer Ushruf,* or as heir to *Gholam Ghous* and *Beeby Ameena* respectively ; in which case the title by which he claims accrued, and the cause of action thereon arose, at a period beyond the period of limitation, and was barred by lapse of time.

II. Because the appellant *Gholam Russool* had not proved himself to be heir or of kin to any of the persons mentioned in the foregoing reason.

III. Because the title by which the other appellant, *Meer Jafir Shah,* claimed a portion of the property in question, accrued, and the cause of action thereon arose, at a period beyond the period of limitation, and was barred by lapse of time.

IV. Because the said appellant had not proved himself to be the heir or of kin to *Beeby Ismut ;* and if the evidence on this point were conclusive, it would not be competent to him to insist upon any rights which might have devolved upon him in that character, upon an appeal in which he was joined as co-appellant with a person who claims adversely to the ownership and title of *Beeby Ismut* and her heirs.

Mr. *Miller,* K. C., and Mr. *Wigram,* K. C., for the Appellants.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the Respondents.

The Judicial Committee, without calling on the respondents' counsel, dismissed the appeal with costs, observing that the decision of the Provincial Court was not warranted either by the evidence or the law of the case, and that they fully concurred in the view taken by the Sudder Court.

Edul-jee Fram-jee .. *Appellant,*

v.

Abd-Oolla Hajee Cherak .. *Respondent.*[*]

On Appeal from the Sudder Dewanny Court of Bombay.

Acknowledgment of debt—Proof of—Acknowledgment not signed by debtor—Admissibility.

The draft of an acknowledgment of a debt and agreement to pay the same, which was sworn to have been drawn up in the presence of the debtor, was not signed by him, admitted as evidence of the debt, and a decree made in the Courts below upon such evidence, affirmed with costs.

5 December 1837.

The concurrent decisions of the Zillah Court of *Surat* and the Sudder Adawlut of *Bombay,* which are the subject of the present appeal, were made in a suit brought by the respondent against *Fyz-oolla Khan,* since deceased, and who is now represented by the appellant, for the recovery of a sum of rupees 3,481. 1. 66. principal money, together with interest thereon.

The particulars of the respondent's demand, as stated in his plaint, were, first, in respect of a sum of rupees 715, raised and received by the defendant *Fyz-oolla Khan,* as *Mokhtar*[†] of the respondent, from *Ulla Rakhee Khanum,* by a mortgage of a house belonging to the respondent. Secondly, for the rent of the mortgaged house during the period the same was in the possession of the said *Ulla Rakhee Khanum* as mortgagee, and for the amount of the costs of a suit brought by the mortgagee against the respondent, in consequence of his having denied the authority of *Fyz-oolla Khan* to make the mortgage, and refusing to pay the principal and interest due thereon ; in which suit a decree for pay-

---

[*] Present : Members of the *Judicial Committee,*—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy.

[†] Agent.

1837.
EDUL-JEE FRAM-JEE v. ABD-OOLLA HAJEE CHERAK.

ment was ultimately obtained against the present respondent. Thirdly, for certain sums expended on the behalf and for the value of certain goods sold by the respondent to the said *Fyz-oolla Khan.*

The house which was the subject of the mortgage to *Ulla Rakhee Khanum* was situate in *Surat,* and was the acknowledged property of the respondent, who in the year 1223 Hijra (1808 A. D.) mortgaged it to one *Kulloo Meyan,* for rupees 700. In the same year, and shortly after this mortgage had been effected, the respondent left *Surat* and was for several years absent at *Delhi ;* previous to his departure from *Surat,* he, by power of attorney, duly constituted *Fyz-oolla Khan* his vakeel, and in the year 1224 Hijra (1809 A. D.), *Fyz-oolla Khan,* by virtue of the general powers which his appointment conferred, mortgaged the same house to the said *Ulla Rakhee Khanum* for rupees 715, which money he received. In the year 1814 A. D. the respondent returned to *Surat,* and shortly afterwards the mortgagee, *Ulla Rakhee Khanum,* brought her action against him in the Zillah of *Surat,* for the principal money due on her mortgage. The respondent, by his answer and rejoinder in that suit, denied the justice of the claim, and repudiated the act of *Fyz-oolla Khan.* The Zillah Court by its decree dated the 4th of *March* 1814, nonsuited the plaintiff *Ulla Rakhee Khanum,* on the ground, that she was unable to produce any power of attorney from the present respondent to *Fyz-oolla Khan,* or any instrument constituting him mokhtar or vakeel. Upon an appeal from this decree, the Provincial Court of Appeal was of opinion, that there existed sufficient circumstantial evidence to warrant the conclusion, that *Fyz-oolla Khan* had been constituted the respondent's vakeel ; that Court therefore reversed the decree of nonsuit pronounced by the Zillah Court, and decreed that the present respondent should pay to *Ulla Rakhee Khanum* the principal sum of rupees 715 and the costs in both Courts, and thereupon the respondent was to be put into possession of his house.

In consequence of this decree the respondent, in the year 1818, filed his plaint in the Zillah Court of *Surat* against *Fyz-oollah Khan,* for the sum of S.R. 3,481. 1. 6., being the amount of the decree in the last mentioned suit with interest, and also the amount of the rent of the house which it was alleged had been received by *Ulla Rakhee Khanum,* the mortgagee.

The defence made by *Fyz-oollah Khan* was, that he had full and specific authority to mortgage the house to *Ulla Rakhee Khanum,* for the purpose of paying off the prior existing mortgage to *Kulloo Meyan,* who, previous to the departure of the respondent from *Surat* to *Delhi,* had pressed for his money; and that 700 rupees, part of the 715 rupees received from *Ulla Rakhee Khanum,* were in fact applied by him, *Fyz-oollah Khan,* in redeeming the prior mortgage, and that the remaining sum of 15 rupees was the amount of certain expenses attending the transaction.

The liability of *Fyz-oollah Khan,* and the justice of the respondent's demand against him, was established by the depositions of three witnesses examined by him in the Zillah Court, namely, *Deenshah Edul-jee, Syud Umeer-ood-deen,* and *Moofti Gholam Ali,* and by a paper containing an express acknowledgment of debt made by *Fyz-oollah Khan,* which was produced by the last-mentioned witness.

His deposition was as follows: "I am acquainted with both parties. That about three years and three months ago, the plaintiff (the present respondent) and defendant came to my house, and got me to write a copy of a *kurar-dad** on *Meyan Abd-oolla's* claims, which they took away with them, and afterwards defendant gave it to me in the Adawlut to writ on stamp paper ; and I think that that copy was written over on the stamped paper, and *Fyz-oollah Khan* gave it to defendant. My seal is not on it, because *Fyz-oollah Khan* said, 'I will bring this paper back when I have got witnesses for it;' but he never brought it to me, and the copy of that I think is in my possession."

At the time of taking the above deposition of the *Moofti,* the vakeel of the respondent presented a petition to the Zillah Court, praying for the production of the foul copy of a note in the possession of the witness. The copy was accordingly produced, and was of the following tenor.

" Confession of *Fyz-oollah Khan, Pathan,* inhabitant of *Delhi,* but now residing at *Surat,* attending in the presence of *Gholam Ali Moofti.*

"I know that there was a house situate in the *Modug Mehley,* belonging to *Meyan Abd-oolla,* son of *Hadjee,* the premises of which I rented. I was in great want of money, and I was pressed to pledge the property with one *Ulla Rakhee Khanum* for 715 rupees, and the amount was spent by me ; and I agreed that the same should be redeemed after the return of *Meyan Abd-oolla* from *Delhi,* after which I repaired to *Poona* on private urgent affairs. However, shortly after the return of *Meyan Abd-oolla, Ulla Rakhee Khanum* preferred a complaint, and obtained a decree against him for rupees 976. 3., including costs, which *Meyan Abd-oolla* accordingly paid, and soon after my return from *Poona* I was informed of the particulars. *I acknowledge that I am indebted to Abd-oolla the sum of rupees* 2,207. 3. 52., *and the same I now promise to pay on demand, with due interest, at the rate of one per cent. per month, and for the whole amount I have passed a writ which is true and fair.*"

---

* Deed of agreement or compromise.

This document did not bear the signature of *Fyz-oollah Khan.*

On the 12th day of *June* 1820, the Zillah Court of *Surat* made its decree, and thereby declared its opinion upon the case in the following terms :—"It appears on investigation, that plaintiff and defendant were friends, and that the defendant mortgaged the plaintiff's house to *Ulla Rakhee Khanum,* on which case a decree was passed in the Adawlut and Court of Appeal, and the money paid by *Ulla Rakhee Khanum* to the defendant was repaid her by the plaintiff, and the present action is to recover that money, together with other items. The plaintiff denies having constituted the defendant his attorney, or having empowered him to mortgage the house. It appears to the Court that the decree of the Appeal Court does not interfere with the present action, as this is to recover ready-money which the defendant received on the plaintiff's account, and appropriated to his own use. The Court does not consider any of the numerous letters filed to be proved in any way. The Court, however, conceives the paper, the rough draft of the agreement or acknowledgment of the debt due by the defendant to the plaintiff, produced by *Moofti Gholam Ali,* to be fully proved. The *Moofti* declares on oath, that it was drawn out by him at the instance of the defendant, the plaintiff being present at the time ; that a fair copy was taken by him on stamp paper and given to the defendant, the rough draft was left with him. The Court thinks this paper explains the whole business, and that the defendant has acted as asserted by the plaintiff ; that he mortgaged the house without authority to do so, and appropriated the money to his own use. The Court therefore determines to decide the suit on this document, holding the paper in the light of an adjustment between the parties." The order of the Court therefore was, that the defendant *Fyz-oollah Khan* should pay to the plaintiff (the present respondent) the sums mentioned as due, amounting to rupees 2,177. 3. 36., with interest. And to the extent recovered the defendant was also to pay the costs of suit.

The defendant *Fyz-oollah Khan* appealed from this decree to the Sudder Adawlut. The sitting judge (*Thomas Barnard,* Esq., Fourth Judge) before whom the appeal came in the first instance, differed in opinion from the Judge of the Zillah Court, and considered the decree appealed from to be erroneous. The case was therefore referred to the full Court which met on the 8th of *August* 1822, *John Romer,* Esq., Chief Judge, and *Edward Ironside,* Esq., Third Judge, being the judges present on that occasion. When the Court was of opinion (the Fourth Judge being dissentient,) that there was not the smallest reason to doubt the truth and impartiality of the evidence of *Moofti Gholam Ali,* corroborated as it was by other witnesses, and that there was clear and circumstantial proof that the parties had adjusted their dispute, and had reduced the entire terms of this adjustment to writing, although a formal document was not subsequently exe-

1837.

EDUL-JEE FRAM-JEE *v.* ABD OOLLA HAJEE CHERAK.

cuted. The decree of the Zillah Court was therefore affirmed with subsequent interest and costs.

From the foregoing decree of the Zillah Court of *Surat,* and the decree of the Sudder Adawlut affirming it, the original defendant, *Fyz-oollah Khan* appealed to His Majesty in Council ; but on the 8th of *December* 1822, he departed this life, and upon the report of his death to the Sudder Adawlut, that Court admitted the present appellant as his representative to prosecute the appeal, who submitted that the decree of the Sudder Court ought to be reversed, for the following reasons :—

I. Because *Fyz-oollah Khan Azum Khan* was duly empowered by the respondent to effect the mortgage to *Ulla Rakhee Khanum.*

II. Because the principal sum secured by the mortgage of the premises to *Kulloo Meyan* was paid to the mortgagee by *Fyz-oollah Khan Azum Khan,* and he received no funds from the respondent for that purpose.

III. Because the pretended draft of acknowledgment was not proved ; and even if it had been made in the manner represented, *Fyz-oollah Khan Azum Khan* could not, under the circumstances, be bound by it.

The respondent, on the other hand, submitted, that the decree of the Sudder Adawlut should be affirmed, for the following reason :—

Because, to the extent to which, by the decrees appealed from, the respondent's demand had been established, there was sufficient evidence and proof of a debt due to him from the original defendants.

Mr. *Miller,* K. C., Mr. *Wigram,* K. C., and Mr. *Jackson,* for the Appellants.

1837.

EDUL-JEE FRAM-JEE *v.* ABD-OOLLA HAJEE CHERAK.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the Respondents.

Mr. Justice BOSANQUET :

This suit was commenced for the purpose of recovering 3,481 rupees. A judgment has been given for a smaller sum. The judgment given by the Zillah Court, which has been subsequently confirmed, was for 2,207 rupees, with interest upon it. The plaint begins by saying, "I have claim against *Fyz-oollah Khan,* amounting to 3,481 rupees, principal and interest, on an account, the particulars of which are written below;" and after stating several circumstances, the particulars are stated in several items, amounting to the sum claimed, to 3,481 rupees. The whole of that was not proved, and there was a defect of proof of the circumstances that are mentioned in the plaint ; but there was proof of the acknowledgment on the part of the defendant, to the plaintiff, provided the evidence that was given of a paper that was brought to the *Moofti,* and on which he gave evidence, and of which he said he made a copy, and of which he professed afterwards to produce a copy, was evidence in the case.

Now, with respect to the testimony of the *Moofti,* itself, there does not appear to be any ground for imputing any discredit to it.

The only real objection which is now made in this case, is an objection that was not taken at all in any of the Courts below. It was assumed apparently upon those proceedings, from the beginning to the end, by the parties, and by all the Courts through which this cause has passed, that the paper which is set out in the appendix is the paper that was spoken of in the evidence of the *Moofti,* when he stated, that the parties

1837.
EDUL-JEE FRAM-JEE *v.* ABD-OOLLA HAJEE CHERAK.

came before him, and agreed that a paper should be drawn up and acknowledged that he was entitled to the amount in question. There is not one word in any of those petitions of appeal, or any observations of any one of the Judges, that throws any doubt upon the identity of that paper.

It appears to their Lordships, that under these circumstances it is quite clear, that the parties have taken this paper to be the paper spoken to ; and that therefore we must consider that, as the paper spoken to by the *Moofti* in his evidence. Then if so, that is an acknowledgment that the amount of 2,701 rupees was due by the present appellant, upon which, of course, interest follows ; one Judge thought it necessary that there should be a deed, amounting to a compromise, for the sum in question, and that the paper in question being incomplete, it was not able to be supported as such ; but the other Judges of the Sudder Court, which was the superior Court, appear to have treated it as I think they were bound to treat it, namely, as an acknowledgment by the party who agreed to the contents of that paper, that he did owe the present respondent that amount ; and it is a common and ordinary course, that an action is brought for a certain sum, and judgment is given for a smaller amount. As this is a case, in which the judgment of the Sudder Adawlut must be affirmed, and as this judgment has already been affirmed by two Courts, their Lordships are of opinion, that it must be affirmed with costs.

MUSSUMAT KEEMEE BAEE .. *Appellant,*

v.

LATCHMAN-DAS NARRAIN-DAS .. *Respondent.*

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Regulation II of 1800, *S.* 7—*Costs—Discretion of Court—Suit by servants in respect of injury caused by the reputation of deceased master—Dismissal of—Costs, award of.*

In a suit brought on behalf of a mercantile firm, for an alleged injury supposed to have been sustained to the reputation and trade of the firm; it appearing in the course of the proceedings in the Zillah Court that the principal had died pending the suit, the Zillah Court dismissed the suit, and decreed each of the defendants to pay his own costs. On an appeal by one only of the defendants in the original suit, it was held by the Judicial Committee, affirming the judgments of the Provincial and Sudder Dewanny Courts, that in accordance with Reg. II of 1800, sec. 7, the costs of the suit in the Zillah Court ought to have followed the decree, and that the judgment to that extent must be reversed.

Semble.—The Judicial Committee will not entertain an appeal merely for costs.

5 December 1837.

ON the 1st of *December* 1825, *Vittul-das* and *Jadoo Ram* (the original plaintiffs), acting on the behalf, and as the representatives of the firm of *Bucktoo Mull Mool Chund,* filed their plaint in the Zillah Court of *Surat* against the respondent and his brother, *Bheem Sain*; the matter of their complaint was, that in the afternoon of the 30th of *November* 1825, the two defendants had caused a clerk of the *Nazir*[*] to enter the shop of the firm without any warrant for that purpose, to search for, and to attach certain goods which the defendants alleged were there concealed, and to be the property of the firm of *Doola Chund,* in which they (the defendants) were interested; that the defendants stood in front of the door, and having collected a crowd, used abusive language to the plaintiffs, and impeached, without cause, the credit and character of the shop, and of the plaintiff's master. The plaintiffs therefore claimed to recover of the defendants the sum of 100,000 rupees for damages.

---

[*] A supervisor or inspector. The officer of the Courts who is charged with the service of its process.

The present respondent, by his answer to the plaint, stated, that he was no party to the acts and proceedings mentioned in the plaint, and that with respect to him, the charge was groundless.

From the answer of the other defendant, *Bheem Sain*, (who was not a party to the appeal), and from the documents filed in the Zillah Court, it appeared that the defendants had, shortly before the filing of the plaint, obtained a decree in the Zillah Court of *Surat* in another suit, whereby their right to a share or shares in the shop and property of the late *Doola Chund* was established, and for the purpose of carrying this decree into execution, the present respondent and his brother, *Bheem Sain*, had, on or about the 18th of *November* 1825, obtained an order of the Zillah Court, directing the Nazir to take an inventory of the shop and property of *Doola Chund* ; but the parties in that suit having come to an agreement between themselves, the order was by arrangement not executed, and the keys of the shop of *Doola Chund* were delivered into the custody of the Court. In this state of things, *Bheem Sain*, one of the defendants in the present suit, obtained intelligence (as he by his answer alleged) of the arrival at *Surat* of certain goods belonging to *Doola Chund's* firm, and that with a view to evade the aforesaid decree, they had been carried to, and were concealed in the shop of *Permanund-das,* who was the owner of *Bucktoo Mull Mool Chund's* shop, and master of the original plaintiffs in the present suit. The defendant, *Bheem Sain*, gave information of this fact to the Nazir, who thereupon sent for the plaintiff, *Jadoo Ram,* the mokhtar of *Bucktoo Mull's* shop; and the Nazir was induced, from the statements, and with the consent of each party, to send one of his clerks to the shop, in order to examine the marks upon the goods in question, and to ascertain whether they belonged to *Doola Chund's* shop or not; but upon the Nazir's clerk going for this purpose, the people at the shop opposed him, and would not let the marks be examined.

The plaintiffs, in their reply to the answers of the defendants, attempted to make out a case of special damage, occasioned by the alleged acts and proceedings of the respondent and the co-defendant his brother; they stated that the mob which the defendants had collected about the shop having been seen, it caused a run upon the shop, to meet which the plaintiffs were obliged to part with the goods of the firm at a reduced price.

The only evidence taken by the Zillah Court relative to the matters of complaint urged by the original plaintiffs, was the report of the Nazir upon an order of reference made to him by the Zillah Court. The Nazir by his report stated, that on the 30th of *November* 1825, *Peston-jee* (who was the vakeel of the defendants in their suit, instituted to recover a share of *Doola Chund's* shop) informed him (the Nazir), that certain goods belonged to the firm of *Doola Chund,* which had just arrived at the Custom House from *Bengal,* had been taken from thence and concealed in the shop of *Bucktoo Mull Mool Chund.* That the Nazir informed both *Peston-jee* and *Bheem Sain* that without an order of Court for the purpose, he could not send a clerk to the shop of *Bucktoo Mull Mool Chund* to examine and make an inventory of the goods in question ; but after much altercation, *Jadoo Ram Mokhtar* (who was one of the original plaintiffs), and the defendant, *Bheem Sain,* and the present respondent, having consulted and agreed, told the Nazir they both consented he should send a clerk to take down the marks and letters on the bales ; that in the evening the clerk came and told the Nazir that he went to the shop of *Bucktoo Mull,* but the plaintiff, *Vittul-das,* the *Monim* or cashier of the shop, was absent ; and the other clerks, not understanding the matter, began disputing, from which a great disturbance took place, almost amounting to a riot. After that, a mob that had collected came, and *Bheem Sain* with them, when *Vittul-das,* the *Monim,* having come with the keys, offered them to the Nazir, and was willing that a clerk should go to the shop to write down the marks and numbers of the goods in question ; but this was declined by *Bheem Sain,* who wished to defer the taking of this step till he had obtained another order.

This report of the Nazir was the whole of the evidence relative to the subject of complaint. There was no evidence of any special damage sustained by the plaintiffs or by their master *Permanund-das,* either in property or character, from the acts or proceedings imputed to the defendants in the suit ; and it appeared from the Nazir's report, that the sending of a clerk to the shop of *Bucktoo Mull,* which was the cause of whatever disturbance took place, was done by the consent of the plaintiff, *Jadoo Ram,* the *Mokhtar* of *Bucktoo Mull's* firm ; and the present respondent was not implicated in any of the proceedings further or otherwise than by consenting to that measure. Shortly after the plaint was filed, and pending the suit, *Permanund-*

1837.

MUSSUMAT KEEMEE BAEE *v.* LATCHMAN-DAS NARRAIN-DAS.

das died, but no notice was taken of the event in the proceedings in the cause.

On the 11th day of *November* 1826, the Zillah Court of *Surat* made its decree, the material part of which was as follows :

"On reading all the papers in this case, it appeared that the plaintiffs brought an action, stating that they were respectively the *Monim* and *Mokhtar* of *Permanund-das Bothoo Ram,* trading in the name and firm of *Bucktoo Mull Mool Chund ;* and they further represent, that in consequence of the acts of the defendants, the reputation of their own master, *Permanund-das,* and the credit of the shop, have been endamaged. From the allegations in this petition it appears, that the plaintiffs have personally suffered in character, as well as *Permanund-das ;* but when these people were questioned on this point, they denied these circumstances, and stated that only *Permanund-das* and the shop had suffered loss of reputation, and that the action was not brought for their personal characters. Regarding the damage sustained by *Permanund-das,* in his reputation, it appears in the judgment of the Court, that the plaintiffs have already admitted in Court that *Permanund-das,* while returning from *Benares* to *Surat,* before the petition in this case was filed, died on the road, and eight days after this petition was filed, intelligence of his death reached *Surat ;* therefore it does not appear necessary to enter into any discussion regarding this *Permanund-das,* because, with reference to what affected *Permanund-das,* in this matter, such became nullified by his death. With respect to the loss of reputation of the firm, it appears to the Court that *Permanund-das* was sole proprietor of the shop, neither were there any partners in this shop ; but when the allegations set forth in this petition occurred, and this petition was filed, it was at the time understood that *Permanund-das* was living. When he died, however, the claim for injury to this shop no longer existed ; not unlike the case of a person who brings an action for injury done to his personal character, and who dies before it is decided. The Nazir made a report by an order of Court on the 1st of *November* 1826, from which it appeared that, after much disputing, the plaintiff, *Jadoo Ram Raja Ram,* and the keeper of the keys of this shop (cashier), agreed and resolved to permit *Bheem Sain* to come to their warehouse to examine the marks on the bales of goods ; therefore the Nazir sent the *Mehta* along with them. The accusation arising out of the acts of the defendants in consequence, whereby the reputation of the shop was endamaged, has therefore become of no effect. That many people collected about the shop is true, but for that circumstance no responsibility rests with the defendants. In this matter the petition which the plaintiffs have filed cannot be allowed to proceed further, nor can any further proceedings be permitted with regard to either *Permanund-das's* personal character, or that of the shop. It appears, however, to the Court, that the Nazir has acted rather imprudently in this business, inasmuch as at that time he possessed no order in his hands to make inquiry about, or to take any memorandum of the goods of the shop of *Doola Chund Candaharee Mull,* nor had he ever received any instructions whatever to inquire after any goods at the plaintiff's warehouse. The Nazir's duty respecting the execution of the order was clear, and he must have known it was necessary to wait for another order before proceeding to the lengths he did. But as the Nazir's conduct was not included in the allegations of this petition, it does not seem necessary to state any thing more with reference to him. It appears to the Court, in regard to costs, that as the defendants' proceedings in this case justly merit reprehension, they should be ordered to pay their own costs, because it is evident from the Nazir's report, that both defendants were present at the disturbance."

The present respondent, considering that he was aggrieved by this decree, inasmuch as he was made to bear his own costs of defending himself against a claim which the Court ultimately dismissed, appealed to the Sudder Adawlut at *Surat*. Upon the removal of that Court to *Bombay*, the appeal was transferred, and prosecuted in, the Provincial Court of *Guzerat*.

In the prosecution of the appeal before the Provincial Court, the present appellant was introduced as a respondent, upon a petition made by her, alleging that she was the widow of *Bucktoo Mull*, and that the deceased *Permanund-das* was in his life merely the head manager of the shop by virtue of her appointment. She therefore claimed, as owner of the shop, the reputation of which had been injured by the proceedings of the original defendants, to be entitled to defend the appeal in the Provincial Court.

On the 19th day of *February* 1829, the Provincial Court, on the authority of Regulation II. of 1800, sect. 7, which directs that, after the parties in a suit have been heard and witnesses and exhibits examined and considered, the Judge is to give judgment according to justice and right, and is to order costs to be paid to the party in whose favour the decree should be made, reversed so much of the decree of the Zillah Court as adjudged the present respondent (the appellant in the Provincial Court) to bear his own costs; which costs, together with the costs of the appeal, were ordered to be paid by the present appellant.

From the decree of the Provincial Court the present appellant appealed to the Sudder Adawlut of *Bombay*, and, on the 15th day of *January* 1830, that Court affirmed the decree of the Provincial Court, and further decreed, that all the costs incurred in the Sudder Adawlut should be borne by the appellant. From this decree the appellant appealed to His Majesty in Council; praying that the said decision might be reversed for the following reasons:—

I. Because section 7, Regulation II, A. D. 1800, was not applicable to suits instituted for damages arising from injury to character, and had not hitherto in practice been so applied.

II. Because the conduct of the respondents was obviously irregular and malicious, and the original plaintiffs' suit having only failed by the death of their principal, the Zillah Court was called upon, in justice and equity, to direct each party to pay their own costs.

III. Because it was satisfactorily established, that in such cases as the present, the Zillah Court of *Surat* claims, and has exercised, the power of apportioning the costs according to its view of the conduct of the parties, although the plaintiff may be said, in strict technical language, to have failed in this action.

The respondent, on the other hand, contended, that the decree ought to be affirmed, for the following reasons:—

I. Because the original suit in the Zillah Court of *Surat* having been dismissed, that Court was not com-

1837.
MUSSUMAT KEEMEE-BAEE v. LATCHMAN-DAS NARRAIN-DAS.

petent to exercise any discretion on the subject of costs, but ought to have given the respondent, as one of the defendants in the suit, his costs as of course.

II. Because, if it had been within the competence of the Zillah Court to exercise any discretion with respect to the costs of the defendants, the respondent ought to have had his costs, inasmuch as not only the original plaintiffs failed to make out any case for a decree in their favour, and upon their own showing, they were not entitled to maintain any action for the causes of complaint stated ; but there was also no evidence of the respondent having committed, or having been implicated in, any act or proceeding of an illegal or reprehensible character.

Mr. *Miller*, K. C., Mr. *Wigram*, K. C., and Mr. *Jackson*, for the Appellant, cited Daee *v.* Motee Methoo,* and Reg. IV. of 1827, sect. 58, cl. 1.

Mr. Serjeant *Spankie*, and Mr. *E. J. Lloyd*, for the Respondent.

The CHIEF JUDGE of the Court of Bankruptcy :

It will not be necessary to hear the counsel on the part of the respondents in this case. The question arises upon Regulation II, of 1800, sect. 7, which enacts, "that after the parties in a suit have been heard, and witnesses and exhibits examined and considered, the Judge is to give judgment according to justice and right, and is to order costs to be paid to the party in whose favour the decree should be made. There are subsequent Regulations which are applicable to cases, where the parties may elect to proceed in their cause, or where the defendant absconds and does not appear.

---

* 1 Borradaile, Bombay Reps. 75.

In this case the action was brought by two of the clerks of a person of the name of *Permanund-das,* for injury supposed to have been sustained to the reputation and the trade of their master, by the conduct of the defendant. It appeared in the course of the cause, that the master died before this action had been commenced, and therefore, although some injury had been sustained by the plaintiffs themselves, they rejected that as the ground of their suit, and rested their case entirely upon the right that their master had to recover damages for injury sustained by him: the Court thought that the suit could not be further proceeded in, and non-suited the plaintiff, but directed that each party should pay their own costs.

Now if there had been a discretion with respect to the costs, vested in the Zillah Court, their Lordships would not, I think, have allowed an appeal against the exercise of that discretion, because no appeal against a decree merely as to costs would be allowed; but the question here is, whether the Zillah Court had any discretion to exercise, and whether they were not bound by the terms of Regulation II, sect. 7, 1800.

Upon the appeal by one of the defendants against this decision, the Provincial Court and the Sudder Dewanny were both of opinion, that the Zillah Court had no discretion, and ought to have decreed both the defendants their costs; but inasmuch as the appeal there was only by one of the defendants, they would not reverse the sentence against the other defendant,

1837.

MUSSUMAT KEEMEE-BAEE v. LATCHMAN-DAS NARRAIN-DAS.

who had not appealed, but did so in favour of the defendant appealing, and gave him the costs also of the appeal.

Their Lordships are of opinion that the judgment of the Provincial Court and Sudder Dewanny is correct; that the Zillah Court had no discretion to exercise upon the subject, because the ground of the decision of the Zillah Court appears to have been, that this was a suit instituted by parties who had no right to institute it, the person in whose name and on whose behalf it was instituted being at the time dead, and therefore having no right to institute the suit the judgment was upon the merits, that the whole case being before the Court, according to the provision in the Regulation they must give the costs according to the result of the suit.

A case has been cited from Borradale's Reports, in which the Court appears, in an action under very peculiar circumstances, to have given a most extraordinary decision. First of all, in deciding that the defendants should pay the costs to a plaintiff who did not succeed, and then, when that plaintiff appealed in two stages to other Courts and failed also there, giving the costs in like manner against the respondents, who in all three of the proceedings had succeeded. This is rather too strong a case their Lordships think to be cited as an authority; and, besides, there appears to have been no objection made by the parties, and no appeal from the decision of the Court below as to costs: the point therefore was never raised, and that decision cannot be cited as an authority for it.

Again, it has been said, that there has been a Regulation passed in the year 1827, (after the decree in question was made,) and that we must look at that Regulation, not merely as declaring what should take place from the year 1827, but as recognizing the practice of the Courts, which is supposed to have prevailed from the time of the passing of the Regulation of 1800 down to that day ; but there is nothing in the Regulation of 1827 which is declaratory, or which shows any recognition of any such practice. The provisions there enacted are evidently prospective only—and inasmuch as this decree was pronounced before that Regulation was made, we must decide this case without any reference to those provisions. Their Lordships are, therefore, of opinion, that the judgment of the Court of Sudder Dewanny must be affirmed, as far as the same applies to the appellant's own proportion of the costs, which amount to 1,298 rupees, in the Zillah Court, and the whole of the costs in the Courts of Appeal from the Zillah Court.

RAJAH DUNDIAL SING, and others .. *Appellants,*

v.

RAJAH ANUND KISHWUR SING .. *Respondent.*

On Appeal from the Sudder Dewanny Court of Bengal.

Bengal Limitation Regulation III of 1793 *and II of* 1805—*Conclusive nature of in questions of title—Adverse possession of defendant for more than the statutory period—Plaintiff alleging fraud—Fraud not proved—Effect.*

The Bengal Regulations of Limitation (Reg. III. 1793, s. 15, & Reg. II. 1805) held conclusive in a question of title, where adverse possession had been held for more than twelve years, and the fraud alleged as taking the case out of the Regulations was not proved.

5 & 7 December 1837.

ON the 6th day of *May* 1808, *Rajah Gunga Persad Sing* (the original plaintiff,) filed his plaint in the Zillah Court of *Sarun,* claiming, upon a plea of title by inheritance, to recover from *Rajah Beer Kishwur Sing* (the original defendant,) possession of pergunnas *Munjhowah* and *Sumrown,* in the talook of *Sungrampoor,* and certain salt-mahals, all which were formerly part of the *sirkar** of *Chumparun,* in *soobah Bahar.* The remaining part of *Chumparun sirkar,* consisting of pergunnas *Maihsee* and *Bubrah,* were in the possession of the plaintiff.

The plaintiff's father's first cousin was *Rajah Dhooroop Sing,* the last undisputed owner and possessor of the whole of the *Chumparun sirkar* : he died in the year 1169 *Fusly* (A. D. 1762) without issue male of his body. Upon his death *Rajah Joogul Kishwur Sing,* (who was the only or eldest son of a daughter of *Dhooroop Sing,*) succeeded to the *rajgy*†, and to the possession of the *sirkar,* as the adopted son and heir of the deceased Rajah. In the year 1173 *Fusly* (A. D. 1766,) one year after the acquisition of the Dewanny by the Government, *Rajah Joogul Kishwur Sing* having joined in opposition to the British Government, and having been defeated by the forces of the East India Company, fled to *Bundlecund,* whereupon the British Government took possession of his estate, and placed the zemindary under the management of their revenue officers. In the year 1771 A. D. he returned upon the invitation of the members of the *Patna* Council, and upon that occasion a portion of his estates, consisting of the pergunnas and other particulars, which were the subject of the suit, was restored to him ; but in consequence of his failing to discharge the revenue assessed upon them, he was, in the following year, again deprived of the management and possession of these pergunnas, and ordered thenceforth to reside at *Patna.*

---

* Division of a province.

† Royalty, dignity or quality of a Rajah.

The *Patna* Council fixed the sum of 12,000 rupees per annum for his *malikana,*[*] of which he was allowed to receive 5,000 rupees for his subsistence ; the residue of the 12,000 rupees was directed to be brought to the Company's account, in discharge of the balance due from him for arrears of revenue. The Council also directed, that the Rajah's subsistence money should be paid to him monthly from the collections of *sirkar Chumparun.*

At the time of *Rajah Joogul Kishwur's* restoration to a portion of his zemindary, the residue thereof (namely, the pergunnas *Maihsee* and *Bubrah*) were bestowed by the Government upon *Rajah Sri Kishen Sing* and *Baboo Abd-ool Sing,* who were first cousins

---

[*] An allowance granted to a zemindar for his support, when he is suspended from possession of his zemindary.

1837.
RAJAH
DUNDIAL
SING
and others
v.
RAJAH
ANUND
KISHWUR
SING.

on the paternal side of the deceased *Rajah Dhooroop Sing.*

The allowance of rupees 5,000 per annum was paid to *Rajah Joogul Kishwur* until his death, which happened in the year 1191 *Fusly* (A. D. 1784.). *Rajah Beer Kishwur Sing,* the original defendant, was his son and heir, and the same allowance was continued to him by the British Government until the year 1197 *Fusly,* (A. D. 1790,) when the decennial settlement was established. Upon the formation of that settlement, *Rajah Beer Kishwur Sing* and *Rajah Sri Kishen Sing* presented to Mr. *Montgomery,* the Collector, separate durkhasts,* praying that the settlement of the whole *sirkar* might be made with them respectively ; and each of them on that occasion advanced adverse claims to the *sirkar* in question, as heir to the deceased *Rajah Dhooroop Sing.* Upon a reference made by Mr. *Montgomery* to the Government for instructions in this matter, the Governor-General in Council confirmed the former division of *sirkar Chumparun,* and directed that, in accordance therewith, the decennial settlement of pergunnas *Munjhowah* and *Sumrown* should be formed with *Beer Kishwur Sing.* The decennial settlement of that portion of *sirkar Chumparun* was in the year 1791 A. D., made with him accordingly, and that of the remainder of the *sirkar* (namely, pergunnas *Maihsee* and *Bubrah,*) was formed with *Rajah Sri Kishen Sing.*

Sri Kishen Sing died in the year 1205 *Fusly,* (A. D. 1798,) and was succeeded by *Gunga Persad,* the original plaintiff, his son and heir. The plaint was filed on the 6th of *May* 1808, after a lapse of seven-

---

* Petitions.

1837.
RAJAH DUNDIAL SING and others *v.* RAJAH ANUND KISHWUR SING.

teen years from the time at which the decennial settlement was formed, and throughout the whole of which period *Rajah Beer Kishwur Sing,* the original defendant, had been in undisputed possession of the pergunnas, &c. forming the subject of the claim.

The plaintiff deduced his title from *Rajah Oogur Sane,* who, he alleged, possessed the whole of the *sirkar* of *Chumparun ;* that upon his death his son, *Rajah Guj Sing,* became vested in the possession, which from him devolved upon his son, *Dulleep Sing ;* that *Dulleep Sing* in his lifetime, in conformity with the usual practice, established *Rajah Dhooroop Sing,* his son, in the succession, and died ; that *Rajah Dhooroop Sing* continued in possession of the *rajgy* up to the year 1168 *Fusly* (A. D. 1761) ; but in the year 1169 *Fusly,* (A. D. 1762,) upon due consideration of right to succession as established in the family, he made over, while he was still alive, the *rajgy* of the said *sirkar* to *Rajah Sri Kishen* (the father of the plaintiff,) son to *Pirthee Sing,* grandson to *Rajah Guj Sing,* and nephew to *Dulleep Sing,* and at the same time executed in his favour a deed of conveyance of the *rajgy* and the *milkeut* of the estate comprising the whole of the *sirkar* aforesaid, and gave him entry into the zemindary. The plaintiff represented, then when, in the year 1170 *Fusly,* (A. D. 1763,) the British Government was established, the lands comprized in the said *sirkar* were attached, but that *Sri Kishen* continued to receive the *malikana,* and other rights annexed to the zemindary up to 1177 *Fusly* (A. D. 1770); that in the following year the settlement of the whole *sirkar* was made with him, and from the year 1772 A. D. to 1790 A. D., although the business of the *sirkar* was conducted by the *Amins,*[*] and at other times entrusted to the *Mootahdars,*[†] the plaintiff's father, *Sri Kishen,* received the *malikana.*

The plaint then proceeded to state the manner in which, upon the formation of the decennial settlement in 1790 A. D., *Sri Kishen* had been deprived of the possession of the pergunnas, &c. which the plaintiff claimed to recover, and alleged certain fraudulent practices, whereby possession had been obtained by the defendant, *Beer Kishwur,* and by which it was attempted to relieve the plaintiff's case from the bar created by lapse of time.

In conformity with the provisions of Reg. XIII. of 1808, the case was transferred from the Zillah Court of *Sarun* to the Provincial Court of *Patna ;* and the suit having afterwards abated, by the death of the plaintiff, *Gunga Persad Sing,* was in the year 1810 revived, and prosecuted in the Provincial Court by his son and heir, the present appellant, *Dundial Sing.*

On the 21st of *July* 1810 the defendant, *Beer Kishwur,* filed his answer to the plaint, insisting upon his title as son and heir of *Joogul Kishwur,* the adopted son of *Dhooroop Sing,* and denying the several allegations contained in the plaint ; he relied also upon the bar to the plaintiff's claim arising from lapse of time.

The plaintiff's replication and the defendant's rejoinder were afterwards filed, and the parties then produced their evidence, which was wholly documentary.

---

[*] A commissioner, a provincial native officer, appointed to the temporary collection of the revenue.

[†] A person who engages for the payment of the Government revenue ; a revenue farmer.

The first piece of documentary evidence produced by the plaintiff was a copy of a deed of conveyance of the *rajgy* and *sirkar* of *Chumparaun,* dated 1169 *Fusly,* (A. D. 1762,) alleged to have been executed by *Rajah Dhooroop Sing* in favour of *Sri Kishen,* and whereby he was constituted heir and successor to the said Rajah. The original deed was not produced, or its due execution proved, nor was any evidence given to show that such a deed had been executed, or had been produced at any former period.

The next document was a copy of a lease granted by the Government, of the whole *sirkar* for the year 1178 *Fusly* (A. D. 1771,) in favour of *Sri Kishen* and *Abd-ool Sing*, in which they are termed *Maliks* and *Zemindars* of the *Chumparun sirkar.* This lease was granted previously to the return of *Rajah Joogul Kishwur* from *Bundlecund,* upon the invitation of the *Patna* Council, and whilst, in consequence of *Rajah Joogul Kishwur's* defection and flight, the *sirkar* of *Chumparun* had been assumed by the British authorities. The plaintiff also produced two perwannas, addressed by *Nawab Kassim Khan* to *Sri Kishen,* wherein he is recognized as zemindar, and is directed to conduct the business of the *rajgy,* and to discharge the revenues. These orders were dated respectively in the years 1762 and 1764 A. D. ; but were not proved to be genuine.

The plaintiff produced some other documents, none of which had any bearing upon the case.

No evidence was given in support of the allegations of fraud and collusion, which, by the plaint, were charged against the defendant.

The documentary evidence produced by the defendant consisted,

First,—Of letters addressed to *Rajah Joogul Kishwur* by the members of the *Patna* Council and Mr. *Golding,* the Collector, inviting him to return to the British territories, and to appear before the Council at *Patna,* with assurances of favour and protection.

Second,—Two orders or certificates of the collector, the first of which appeared to be an order, directing the malguzars in pergunnas *Munjhowah* and *Sumrown,* whose revenue payments were in arrear for the year 1178 *Fusly,* (A. D. 1771,) to pay their arrears to *Joogul Kishwur* as zemindar of those pergunnas. The other was an order or certificate, dated 27th *January* 1791, A. D. notifying to the village officers and ryots, that the pergunnas *Munjhowah* and *Sumrown* had, in obedience to the orders of the Governor-General in Council, been allotted to the defendant, the son of *Joogul Kishwur,* deceased, as his *milkeut* and zemindary, and directing them to pay to him, as malik and zemindar, the revenues of the lands comprised in those pergunnas.

Third,—Certain revenue accounts for the years 1179, 1180, and 1181 *Fusly,* (A. D. 1772, 1773, 1774,) showing by the two former, that pergunnas *Munjhowah* and *Sumrown* were the recognized inheritance and *milkeut* of *Joogul Kishwur;* and the last, relating to 1774 A. D., that he was entitled to a portion of the *malikana* due in respect of the *sirkar* of *Chumparun,* and *Sri Kishen* to other part thereof, which division of the *malikana* for the whole *sirkar* between these two persons would follow upon the partition made of the *sirkar* in 1771 A. D.

The defendant also filed a duly authenticated copy of the orders of Government, in obedience to which the decennial settlement of pergunnas *Munjhowah* and *Sumrown* was made with him in the year 1791 A. D., the tenor of which excluded the possibility of that settlement having been affected by means of any intrigue or collusive dealing between the defendant and *Jugmohun*, as alleged by the plaint.

Upon the evidence thus adduced, the Provincial Court, on the 29th of *October* 1812, gave judgment in the cause, and dismissed the plaintiff's suit with costs, observing that, "As the plaintiff and his father never held possession of the mahals in contention, either by regulating their internal management, by making their revenue collections, or by receiving their *malikana* during the course of twelve years, indeed for a much longer period (that is to say, from the year 1169 to 1215 *Fusly,* when the claim was first prosecuted), this case does not, agreeably to the Regulations, come within the cognizance of the Court ; it is therefore ordered and decreed, that the claim of the plaintiff be dismissed, and that he be made liable for all the costs of suit upon it."

From this decree the plaintiff, *Dundial Sing,* appealed to the Sudder Dewanny Adawlut. The other two appellants, *Doosht Doowun Sing* and *Radha Mohun Sing,* who were brothers of the original plaintiff, *Gunga Persad Sing,* and interested in the suit, were admitted by the Sudder Dewanny Adawlut to join with their nephew, the appellant, *Dundial Sing,* in the prosecution of the appeal ; and they and their co-ap-

1837.

RAJAH DUNDIAL SING and others *v.* RAJAH ANUND KISHWUR SING.

pellant, *Dundial Sing,* subsequently filed a great number of additional documents.

On the 9th of *May* 1816, the Sudder Dewanny Adawlut considered it requisite to ascertain who was the incumbent of the *Chumparun sirkar* from 1170 to 1172 *Fusly* (A. D. 1763 to 1765), and ordered that the register of the Court should address a letter to Government and the Board of Revenue, to transmit either the originals or the copies of such papers as might have been placed among the records of Government, tending to show the occupancy by any zemindar of the sirkar during that interval.

Before the appeal to the Sudder Dewanny Adawlut was ripe for judgment, *Beer Kishwur Sing,* who was the original defendant in the cause, died; and upon his death the present respondent, his son and heir, was admitted to defend the appeal.

On the 8th day of *July* 1817, the Sudder Dewanny Adawlut gave judgment in the appeal, and after stating the circumstances already detailed, declared the following as the opinion of the Court :—

"The claim of the appellants to succeed to *Rajah Dhooroop Sing,* who died before the present Government was established, can have no title to a hearing, because they have neglected to bring it to the notice of any of the Courts of Judicature from the time that the Rajah died down to the present moment. It is to be further observed, that if their right to succeed to *Rajah Dhooroop Sing* were acknowledged to be conformable with the ordinations of the *Sastras,** still in that case even the rights of all the

---

* Law texts. Hindoo law.

1837.

RAJAH DUNDIAL SING and others *v.* RAJAH ANUND KISHWUR SING.

parties to the *rajgy* must necessarily be annihilated, because it was confiscated by the State with a view to punish the rebellion of *Joogul Kishwur Sing,* the then incumbent Rajah, and this particular is fully established by the records of Government. Under these circumstances, the groundless claim set up by the successors to *Sri Kishen Sing* and *Baboo Abd-ool Sing* in the year 1215 *Fusly,* is highly unjust, and the decision passed by the senior judge of the Provincial Court of appeal for the division of *Patna* appears to be strictly right and proper, and entitled to affirmation.'' It was therefore ordered, and finally decreed, that the appeal be dismissed, and that the costs of suit be laid at their responsibility.

From this decree the present appellants appealed to His Majesty in Council ; praying that the same might be reversed for the following reasons :—

I. Because it was proved that *Rajah Dhooroop Sing* duly transferred the *raj* to *Rajah Kishen Sing,* and there was no evidence to impeach the deed of 1762, witnessing the transfer.

II. Because no evidence was offered in the Court below of *Rajah Dhooroop Sing* having transferred the *raj* to *Joogul Kishwur Sing,* by having adopted him as his son ; and no such adoption did, in fact, or could lawfully take place.

III. Because, in the absence of such transfer by *Rajah Dhooroop Sing,* the inheritance in question would by law devolve upon the appellants, unless such legal devolution were intercepted by some special ground or legal means.

IV. Because the *sirkar Chumparun* was never, in fact, confiscated by the Government ; and if, as was suggested in the decree of the Sudder Adawlut, there had been a confiscation of the *sirkar* for the rebellion of *Joogul Kishwur Sing,* it could only affect his rights and those claiming under him, and not the rights of the appellants.

V. Because the claim of the appellants was not barred by lapse of time, inasmuch as the possession was not adverse as between the appellants and respondent until the nine years' settlement, made in 1197 *Fusly,* expired, in 1206 *Fusly* (A. D. 1798-9), and because such possession as the respondent had was obtained by fraud.

The respondent, on the other hand, contended that the decree appealed from ought to be affirmed, for the following reasons :

I. Because the appellants failed to show any title to the pergunnas, &c., in question ; but, on the contrary, the title thereto was sufficiently proved to have been vested in *Rajah Joogul Kishwur,* and from him to have descended upon *Beer Kishwur* and the respondent in succession.

II. Because, even if the appellants had made out a case of indisputable title, yet at the time of the filing of the plaint, that title, or the right to sue upon it, was barred by virtue of the provisions contained in the *Bengal* Regulations for the limitations of cival suits.

Mr. *Miller,* K. C., Mr. *Wigram,* K. C., and *Mr. Jackson,* for the Appellants.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the Respondent.

The Judicial Committee, without calling upon the respondent's counsel, dismissed the appeal, affirming

1837.

RAJAH DUNDIAL SING and others *v.* RAJAH ANUND KISHWUR SING.

the decree of the Court below with costs ; observing, that no case of fraud was established against the respondent *Kishwur Sing,* and that the right of action having commenced long anterior to the period limited by the Bengal Limitation of Suits Regulations, the appellant was absolutely barred.

BOMAN-JEE MUNCHER-JEE .. *Appellant,*

v.

SYUD HOOSSAIN ABD-OOLLAH .. *Respondent.**

On Appeal from the Sudder Dewanny Court of Bombay.

Evidence—Secondary evidence—Power of attorney, Proof of—Will containing recital about Power of attorney if sufficient proof—Holder of power if can delegate.

The recital of a power of attorney in a Will, affecting to transmit the authority conferred by it, is not sufficient evidence of the contents of such an instrument in the absence of proof of its loss or destruction. A suit having been brought for the amount of one year's *moghulaee*, or government dues, and amended by claiming, pursuant to Reg. IV. of 1827, ch. ii. sec. 3, ten years' dues, is a suit for the title to the dues as well as for the dues themselves.

6 & 7 December 1837. BY a firman (or royal grant) under the seal of the Emperor of *Delhi,* purporting to bear date the 22nd year of the reign of *Mahomed Shah,* (A. D. 1748,) a certain part of the income of the pergunnah of *Chourasee,* in the province of *Ahmedabad,* consisting of the *moghulaee* or government dues of the villages of *Batta* and *Khansa,* and their dependencies, *Kussolee* and *Lashor,* was granted to *Syud Abd-ool Reheman* and his issue for ever.

On the death of *Syud Abd-ool Reheman,* the dues descended to his son, *Syud Abd-oollah ;* and upon *Syud Abd-oollah's* death, they descended to and became divisible in shares amongst his three sons, *Syud Hamud, Syud Abd-oollah Reheman,* and the respondent, *Syud Hoossain Abd-oollah,* and his two daughters, *Sharifa Fatima* and *Sharifa Alvea.*

---

* Present : Members of the *Judicial Committee,*—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Sir John Nicholl, and the Right Hon. Sir Thomas Erskine, the Chief Judge of the Court of Bankruptcy.

Privy Councillor,—*Assessor,* The Right Hon. Sir Edward Hyde East, Bart.

In the year *Hijra* 1221 (A. D. 1806), the respondent, *Syud Hoossain Abd-oollah,* left *Surat,* where he then resided; and went and settled in the island of *Java;* and it was alleged that previously to his departure he executed and delivered to his eldest brother, *Syud Hamud,* an instrument in the nature of a power of attorney, authorizing him to receive and appropriate his share of the *moghulaee* dues of the villages in payment of his debts, and for that purpose empowering him to mortgage or sell such share.

On the 8th of *May* 1822, *Syud Hamud,* by his agent, *Wittuldas,* executed a mortgage of his own (and in pursuance of this pretended authority included his brother's, the respondent's) shares of the dues of the villages, to *Govindun,* as the agent of the firm of *Atmaram Bookun,* for the sum of R. 12,001.

On the 7th *Mohurrum* 1238 *Hijra* (24th of *September* 1822, A.D.), a short time previous to his death, *Syud Hamud* made and executed, according to the forms and solemnities of the Mahomedan law, an instrument in the nature of a Will and deed of gift, in which, after referring to the alleged power of attorney given to him by his brother, the respondent, *Syud Hoossain,* "he declared, both on his own behalf, and on behalf of his younger brother, *Syud Hoossain,* that the villages of *Batta* and *Khansa* had been mortgaged by him, by the mortgage bond of the 8th of *May* 1822, in order to clear off his own debts, and those due by his younger brother (the respondent), and that as he had paid off all his brother's debts, he had therefore included his

1837.

BOMAN-JEE MUNCHER-JEE *v.* SYUD HOOSSAIN ABDOOLLAH.

brother's share of the dues in the said mortgage. And he thereby constituted his wife, *Sharifa Hadji Begum,* after his death, heir to the said power of attorney, and therefore to pay off the debts which had been contracted on the mortgage, and to be guardian of his children and dependents, and those of his constituent, *Syud Hoossain,* and also authorized her after his death to sell his half share of the *moghulaee* dues of the village of *Batta, and also the half share of his constituent, Syud Hoossain,* (which had been mortgaged,) as heir to him and his said constituent, for the price of the day, and to pay the proceeds into the hands of the aforenamed bankers to whom the property was mortgaged, and to clear off the mortgage from the half share of the village of *Khansa,* and to give *Syud Hoossain,* his constituent aforenamed, his share in charge to his wife, that she might maintain herself and her children, and to keep his share in her own possession, for the maintenance of herself, her two children, and also his other relations and dependents."

On the 6th *Safar Mahasafar* 1240 *Hijra* (30th of *September* 1824, A.D.), *Sharifa Hadji Begum,* by virtue of the authority vested in her by the will and deed of gift of her husband, *Syud Hamud,* entered into an agreement with the appellant, *Boman-jee Muncher-jee,* for the sale to him of the *moghulaee* dues of the village of *Batta,* including the share of the respondent, *Syud Hoossain,* for the sum of R. 25,001, and, pursuant to such agreement, a deed of sale was drawn up by the *Kazi,* bearing date the 26th of *October* 1824, whereby, in consideration of R. 25,001, the whole of the *moghulaee* dues of the village of *Batta,* toge-

1837.

BOMAN-JEE MUNCHER-JEE *v.* SYUD HOOSSAIN ABD-OOLLAH.

ther with the tannah* (with the exception of an income of R. 478, enjoyed by the purchaser by virtue of another bond given by the *Nawab Sufter Jung,* and excepting also an income of R. 227, being the share belonging to *Syud Abd-ool Reheman*), were sold and transferred to the appellant, *Boman-jee Muncher-jee.* The above-mentioned deed of sale was signed by *Rustom-jee Sorab-jee,* as attorney of the said *Sharifa Hadji Begum,* on her behalf, and annexed to it was the seal of *Sharifa Hadji Begum* herself, as well as the signatures and seals of the *Kazi,*† and *Mooftis,* of *Surat,* and of the *Patels* and other officers of the village of *Batta.*

From the completion of his purchase, in the month of *October* 1824, until the year 1831, the appellant, *Boman-jee Muncher-jee,* received the *moghulaee* dues of the village of *Batta* without any claim being advanced by the respondent.

In the year 1831, the respondent put forth his claim to a part of the *moghulaee* dues of the village of *Batta,* which had been so purchased by the appellant, *Boman-jee Muncher-jee,* from the said *Sharifa Hadji Begum,* insisting that the power of attorney given by him to his brother, *Syud Hamud,* on his departure from *Surat,* did not authorize him to sell his share of the said dues, and on the 20th of *January* 1831, the respondent filed his plaint in the Court of the Native Commissioner of *Surat,* against the appellant, and the

---

* Police station and jurisdiction.

† A Public Officer, and Notary, who superintends sales and transfers of property.

1837.

BOMAN-JEE-MUNCHER-JEE *v.* SYUD HOOS-SAIN ABD-OOLLAH.

Carcoon and *Patels* of the village of *Batta,* for the recovery of R. 227, the alleged amount of his share of the dues for the year 1831. The respondent afterwards amended his plaint and claimed, pursuant to *Bombay* Regulation IV. of 1827, ch. 2, sec. 3, the sum of R. 2,270, being ten times the value of the annual sum of R. 227.

On the 11th of *March* 1831, the appellant (the defendant in the Court below,) filed his answer to the above plaint, and on the 26th of *June* following, his further answer to the amended plaint of the respondent, denying the claim advanced by the respondent to the *moghulaee* dues of the village of *Batta,* purchased by him from *Sharifa Hadji Begum,* and insisting on the validity of such purchase.

The plaint came on for hearing before the Native Commissioner of *Surat,* on the 11th of *March* 1831, when documentary and oral evidence was produced on both sides, but the power of attorney upon which *Hadji Begum's* right to sell depended, was not produced, nor was any evidence tendered of its being lost or destroyed, but its original existence and purport assumed from the recital of the Will. On the 31st of *December* 1831, the Native Commissioner gave judgment in favour of the respondent, and expressed his opinion that the power of attorney given by the plaintiff (the respondent) did not authorize *Syud Hamud* to sell his brother's share ; and decreed "that the defendants should collectively pay the plaintiff his share of the *moghulaee* dues of the village of *Batta,* as sued for, for the year *Sumvut* 1887 (A.D. 1831), amounting to R. 227 ; and that the claim by the defendant for R. 227 due upon the deed of sale, for the plaintiff's share, should be thrown out, and all costs were awarded against the defendants."

The appellant, feeling himself aggrieved by the decree of the Native Commissioner, appealed to the Zillah Court of *Surat*; the appeal came on for hearing on the 4th of *February* 1832, before the Judge of the Zillah Court, who reversed the decree of the Native Commissioner, and ordered that the Respondent should bear the costs of both Courts.

The present Respondent appealed against this decree of reversal to the Sudder Adawlut at *Surat*; and upon the appeal coming before the Acting Puisne Judge, he deemed it right to propound to the Mahomedan law-officer of the Court the two following questions :—

First.—"If any person should leave the country, having appointed a person his attorney to mortgage or sell his property, and that person, without the knowledge of his constituent, should, by virtue of that power of attorney, appoint a third person, either by Will or in any other way, to sell or mortgage the property, is he authorized so to do, or not?"

Second.—"If the power of attorney should not be forthcoming, but from the Will being produced and faith being placed in it, would the property being sold of right belong to the heir, or not?"

To these questions, the law-officer of the Court returned the following answers :—

"Having maturely deliberated upon the question above proposed by the Judges of the Sudder Adawlut, and from a reference to the books of law, it appears, that if a person constituting an attorney, should autho-

1837.

BOMAN-JEE MUNCHER-JEE *v.* SYUD HOOSSAIN ABDOOLLAH.

rize him to conduct a single business or businesses, either in his own person or by appointing another, then he is authorized to appoint a third person to do the duty, but otherwise he is not."

The answer to the second question was, that "when a power of attorney is lost, and it appears from a Will that there was a power bearing a certain date under the *Moofti's* seal, and written according to law, clearly authorizing the sale of the property, then having a reliance on the Will, the heir of the attorney is authorized to sell the property of the constituent, as reliance may be placed upon the acts of those who are learned in the law, and in their writings."

Having taken into consideration these replies to the questions of the Court, the acting Judge, on the 25th of *June* 1833, delivered his opinion on the case to the following effect : "The Court considering the mischievous effect that would arise, if Courts of Justice were to recognize illegal sales, merely because the intention was honest, or the authority mistaken, is disposed to annul the sale, as regards the appellant, (the present respondent,) leaving the respondent (the present appellant) to sue for damages from the person from whom he received his defective title."

As a decision to this effect involved a reversal of the decree appealed from, it became necessary to submit the case to the consideration of a full Court, which was accordingly done ; and on the 29th of *June,* each of the Judges having delivered a minute of his opinion, the Court pronounced its final decree, observing, that it appeared to the Court (after taking the opinion of the law-officer,) that it was not competent

1837.

BOMAN-JEE MUNCHER-JEE *v.* SYUD HOOSSAIN ABD OOLLAH.

for *Sharifa Hadji Begum* to alienate by sale the share of the appellant in the *moghulaee* dues of *Batta*, although for his benefit, without the production of full and sufficient powers, and therefore it is determined to annul the same. Yet as *Sharifa Hadji Begum*, had acted under mistaken notions of the powers vested in her, it was considered equitable, under the peculiar circumstances of the case, to direct that the share then in possession of the respondent, belonging to the appellant, should not be alienated in any manner by the appellant, until the result of any legal process which the respondent might institute, should be known, such process being commenced within six months from that date, and in the interim, the proceeds to be recovered and kept under attachment by the Zillah Court. Costs in the three Courts to be borne by the respondent. The decree last-mentioned was pronounced by the majority of the three Judges of the Court, the Chief Judge, James Sutherland, Esq., dissenting from the judgment of his colleagues, and being of opinion, that the judgment passed by the acting Judge of the Zillah Court, was just and proper, and that it ought to be confirmed.

Against this decree the appellant appealed to His Majesty in Council, insisting that it should be reversed, and the decree of the Zillah Court of *Surat*, of the 4th of *February* 1832, ought to be confirmed, for the following reasons :—

I. Because it was proved, by the evidence in the cause, that the power of attorney given by the respondent to his brother, *Syud Hamud*, did authorize a sale of the respondent's share of the *moghulaee* dues of the village of *Batta*, and that by virtue of such power of attorney, and of the will of the *Syud Hamud*, *Sharifa Hadji Begum* had full power and authority to sell the share of the respondent, in such *moghulaee* dues.

II. That inasmuch as the deed of sale of the *moghulaee* dues in question, was drawn up by the Kazi of *Surat*, and its execution attested by two *Mooftis* of the same city, it was to be presumed, in the absence of the power of attorney, that such sale was authorized by, and made in conformity with, the terms of such power of attorney.

III. The conduct of the respondent, with respect to his alleged interest in the said *moghulaee* dues, and more especially, his not asserting any claim for so many years after the sale, and part of the proceeds thereof being applied in liquidation of his debts, were inconsistent with the existence of any *bona fide* right in him, and such facts strongly support the appellant's title.

The respondents, however, submitted that the decree appealed from ought to be affirmed, for the following reasons :—

I. Because it was clear upon the evidence, that the respondent was entitled, as one of the sons of his deceased father, *Syud Abd-oollah*, to the share for which he sued of the *moghulaee* dues of the village of *Batta*, and that the appellant was in possession thereof, claiming title thereto as purchaser from *Hadji Begum*, under an alleged power of attorney from the respondent.

II. Because the appellant was bound to establish his title as purchaser, by adducing proof of the authority of *Hadji Begum* to sell the respondents' share ; which, however, the appellant failed to do, and the evidence of the witnesses to prove the contents of the supposed power of attorney relied upon, was altogether illegal and inadmissible.

Dr. *Lushington,* and Mr. *A. Lewis,* for the Appellant,

Admitted that the *onus probandi* of proving the existence of the power of attorney, authorizing the respondent's brother to dispose of his share, rested with them; but insisted that, in the absence of the power of attorney, the Judicial Committee would infer from the Will that it contained the power insisted on to make the deed of sale to the appellant.

Mr. Serjeant *Spankie,* and Mr. *E. J. Lloyd,* for the Respondents,

Contended that there was not sufficient evidence to raise a legal presumption, that the brother of the respondent was authorized to sell the respondent's as well as his own share of the Government dues; that the Will could not be let in as evidence of the existence of the power of attorney, but that the original instrument must first be proved to have been in existence, and that it had been lost or destroyed before the secondary evidence of the Will could be let in; that the evidence in the present case amounted to nothing higher than an inference, that such an instrument might have existed, but did not reach a legal presumption that any such ever had.

Lord Brougham:

This was a suit for the purpose of setting aside the

1837.

BOMAN-JEE MUNCHER-JEE *v.* SYUD HOOSSAIN ABDOOLLAH.

sale of certain *moghulaee* or Government dues; it was originally brought for 227 rupees, the amount of one year's income of the *moghulaee* dues; but afterwards, by an order made on a supplemental petition, it became a suit for the purpose of disposing of the whole question as to the title and right to sell.

The stamp having been increased from forty rupees, which would have been sufficient had the amount sought to be recovered been the value of one year's income only, to 100 rupees, the amount required, if it had been the ten years' income calculated in order to protect the revenue, in case of the whole value of the estate being in suit and not the year due alone, and the declaration in the decree of the Zillah Court that the vendor, *Hadji Begum,* had no power to sell, leads their Lordships to the conclusion, that that decree meant to dispose of the whole question of title, leaving the purchaser a right to sue *Hadji Begum* at law for damages for having conveyed a bad title, or for the amount of the purchase-money paid.

Having considered the case very minutely, their Lordships are of opinion, that though the case on neither side is free from doubt, and though it is very probable the evidence produced on both sides is not entitled to entire credit, and there appears certainly to be the production of one document respecting the authenticity of which there is much doubt upon the minds of the Court, (viz. the copy of the power of attorney produced by the present respondent, the plaintiff below,) nevertheless they do not see sufficient grounds for reversing the decision come to in the first instance by the Native Commissioners' Court, declaring that *Hadji Begum* was not armed with sufficient power to deal with this property by way of sale after the death of her husband, and that the sale must be annulled which she assumed to make.

It is not necessary to go into the particulars of the case, further than to state that their Lordships are of opinion that the judgment come to by the Sudder Dewanny reversing the decree of the Zillah Court must be affirmed, and that the sale must be annulled. The only observation arising upon that decree is, that there is a certain inaccuracy of expression in the reasons assigned for the reversal, which is stated to be, not the want of power by the *Hadji Begum* to make the sale, not the non-existence *de facto* of a sufficient power of attorney to enable her to sell the absent brother's share of the *moghulaee* dues, but the non-production of the power of attorney—that is inaccurate ; it is not the non-production of the power that is the ground of the decision against the validity of the sale, or against *Hadji Begum's* power to make that sale, but it is the non-proof of that power, or of any circumstances which might have enabled the Court to presume the existence of such a power. It follows that the Zillah Court was not right in the second instance, in holding that *Hadji Begum* had such a power, and obliges the Sudder Adawlut to decree that she not having that power had sold property she had no right to convey, and therefore annulled the sale : the decree of that Court must therefore be affirmed, and the decree having given the plaintiff below (the present respondent) his costs in

1837.
BOMAN-JEE MUNCHER-JEE *v.* SYUD HOOS-SAIN ABD-OOLLAH.

all three stages, must be affirmed also; but under the circumstances of the case, and with reference to the conduct of the parties, their Lordships are of opinion that the respondent should not have his costs of this appeal.

AN

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ABATEMENT OF SUIT.

In a suit brought on behalf of a mercantile firm, for an alleged injury supposed to have been sustained to the reputation and trade of the firm ; it appearing in the course of the proceedings in the Zillah Court that the principal had died pending the suit, the Zillah Court dismissed the suit, and decreed each of the defendants to pay his own costs. On an appeal by one only of the defendants in the original suit, it was held by the Judicial Committee, affirming the judgments of the Provincial and Sudder Dewanny Courts, that in accordance with Reg. II. of 1800, sec. 7, the costs of the suit in the Zillah Court ought to have followed the decree, and that the judgment to that extent must be reversed. [*Mussumat Keemee Baee* v. *Latchman-das Narrain-das*] 470

ACCOUNT-CURRENT.

The Sudder Adawlut of *Bombay* having, on the hearing of a cause, permitted an account-current to be proved by the entries in the plaintiff's *dufters* or account-books, and decreed the defendant to pay the balance upon that evidence, unsupported by oral testimony, and notwithstanding the denial of any sum being due by the defendant in his answer,—held by the Judicial Committee, that under such circumstances the books of account of the plaintiff cannot be used singly as evidence against the defendant, and that the decrees founded thereon must be reversed. [*Sorab-jee Vacha Ganda* v. *Koonwur-jee Manik-jee*] 47

ACKNOWLEDGMENT.

The draft of an acknowledgment of a debt and agreement to pay the same, which was sworn to have been drawn up in the presence of the debtor, but was not signed by him, admitted as evidence of the debt, and a decree made in the Courts below upon such evidence affirmed with costs. [*Edul-jee Fram-jee* v. *Abd-oolla Hajee Cherak*] - - - - - - - - 461

ADVERSE POSSESSION.

1. Where a party sought to obtain possession of certain property deno-

minated a *muddud mash*, against a defendant whose adverse possession had existed from 1761, upon the allegation that such adverse possession was in the character of agent to the plaintiff, the Judicial Committee held (affirming the judgment of the Court below) that the proof of such agency lay on the plaintiff; and the balance of evidence being in favour of the defendant's right to possession, the circumstance of his having registered himself as owner in 1797, without any opposition, or subsequent claim to register on the part of the plaintiff, and having continued in undisturbed possession from that period, was conclusive against the claim set up by the plaintiff. [*Meer Usd-oollah* v. *Mussumat Beeby Imaman*] - - 19

2. The Bengal Regulations of Limitation (Reg. III. 1793, s. 15, & Reg. II. 1805) held conclusive in a question of title, where adverse possession had been held for more than twelve years, and the fraud alleged as taking the case out of the Regulations was not proved. [*Rajah Dundial Sing and others* v. *Rajah Anund Kishwur Sing*] 482

ALIENS (Right of, to hold Lands in Calcutta).

The introduction of the English law into a conquered or ceded country does not draw with it that branch which relates to aliens, if the acts of the Power introducing it show that it was introduced, not in all its branches, but only *sub modo*, and with the exception of this portion. The English law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into the *East Indies*, so as to create a forfeiture of lands held in *Calcutta* or the *Mofussil* by an alien, and devised by a will executed according to the Statutes of Frauds for charitable puropses. [*The Mayor of Lyons v.the East India Company*] 175

APPEAL (Restoration of).
See "PRACTICE," 1.

APPEAL (Consolidation of).
See "PRACTICE," 2.

ARREARS OF REVENUE.

By the revenue Regulations, the Governor-General in Council, upon the report of the Board of Revenue, may order a sale for arrears of a monthly instalment before the close of the year; but in order to warrant that act, there must be an arrear of a previous year, or of a monthly instalment, for which default has been made, after demand by the collector.

A written instrument, or *kistbundy*, for securing the payment of the *kist* by monthly instalments, though usual and advisable, is not *necessary* to entitle the Government to enforce such payment, if the revenue be a fixed monthly *kist* or instalment.

The taking a security-bond with sureties for the payment of accumulated arrears by future monthly instalments, will not discharge the liability of the zemindary for such arrears, or preclude the Government from proceeding to a sale of the zemindary, if such arrears are not duly liquidated.

No excess in the value of the lands sold, over the arrear of revenue due, will vitiate the sale, the Government having, by Reg. V. A.D. 1812, an absolute discretion to sell either the whole or any part of an estate for arrears, without reference to the probable produce of the sale. [*Kirt Chunder Roy* v. *the Government and others*] - - - 383

BANKRUPTCY.

See "INDIAN INSOLVENT ACT."

BENGAL REGULATIONS.

See "LIMITATION OF SUITS."
"ADVERSE POSSESSION."
"ARREARS OF REVENUE."
"REGISTER."

BILL OF EXCHANGE.

A party resident at *Baroda* indorsed two *hoondies*, or bills of exchange, in the name of a firm carrying on the business of banking at *Surat*, alleging himself to be the *gomashtah* or agent of the firm, and afterwards, on the bills being dishonoured, absconded. Held, that in order to fix the firm at *Surat* with the amount of the bills, clear evidence ought to have been produced of the authority to act as *gomashtah*; and their Lordships not being satisfied with the evidence admitted in the Courts below, reversed the decrees of both the Zillah and Sudder Court with costs. [*Madho Row Chinto Punt Golay* v. *Bhookun-das Boolaki-das*] 351

BOARD OF REVENUE (Powers vested in).

See "ARREARS OF REVENUE."

BOMBAY REGULATIONS.

See "ABATEMENT OF SUITS."
"LIMITATIONS OF SUITS," 1, 2.
"POWER OF ATTORNEY."

CHARITABLE BEQUESTS.

A testator devised considerable property, both real and personal, for charitable purposes, amongst which he directed certain sums to be set apart for the liberation of persons imprisoned for debt, and for the endowment and establishment of a College at *Lucknow*, in the dominions of the King of *Oude*. A suit having been instituted in the Supreme Court of *Calcutta*, to administer the Will, the Court directed an inquiry whether the College could be established, and the bequest for the liberation of prisoners carried into effect, with reference to the testator's intention, and the sanction of the Government at *Lucknow*. On the subject of the bequest for the liberation of prisoners, the Master found in the negative, and reported that with respect to the establishment of the College, there was not sufficient evidence to enable him to state whether it could be established with reference to the testator's intention, and the sanction of the *Lucknow* Government; but as no further evidence was likely to be obtained, he appended the correspondence with the British resident at *Lucknow*, by which it appeared that though the King of *Oude* did not object to the establishment of the College, he held out no expectation that he would afford it his countenance or support. The report having been confirmed, and a decree made thereon, the Supreme Court, on a re-hearing of the cause, directed an inquiry whether the Governor-General in Council had the means of giving effect to the bequest to the College at *Lucknow*, and whether he was willing to receive the funds bequeathed for that purpose: the Master found that the Governor-General was willing to receive the funds, but did not state whether he had the means of giving effect to the bequest: the Court, however, thereupon decreed the payment of the funds to the Governor-General, or such person as he should appoint. Upon appeal to the King in Council, held by the Judicial Committee, that though the reference to the Master on the re-hearing, after the confirmation of his previous report, was informal, and if objected to at the time would have been fatal, yet as no objection had been taken, and the Master had not satisfied the whole of the inquiry, by stating whether the Governor-General had the means of carrying the testator's intention into effect, that part of the decree affirming the Master's report, and directing the payment of the fund to the Governor-General, must be reversed, and the case sent back to ascertain that fact; their Lordships being of opinion, that under the existing relations between the East India Company and the King of *Oude*, an arrangement might be made for the appointment of a trustee to carry the *Lucknow* bequest into effect, under the directions and subject to the jurisdiction of the Supreme Court. [*The Mayor of Lyons* v. *the East India Company*] 175

COLLECTOR.

See "ARREARS OF REVENUE."

COMPROMISE.

See "DURESS."

See "LIMITATION OF SUITS."

COSTS.

See "ABATEMENT OF SUIT."

DEBT.

See "ACKNOWLEDGMENT."

DEVISE OF LANDS IN BENGAL.

Lands in the *East Indies*, held by a tenure of the nature of fee-simple, do not pass by an unattested Will, but descend to the person who would be heir-at-law in *England*. A., by an unattested Will, devises lands to B.; B. receives the rents, and by a Will, also unattested, gives the lands, together with a legacy, to the heir-at-law of A. The heir may receive the legacy, and also call for an account of the rents received by B. [*Gardiner* v. *Fell*] 299

DURESS.

The Sudder Dewanny Adawlut having refused to set aside a deed of *razenamah* for compromising an appeal then pending from that Court to the King in Council, on the ground that it was obtained by fraud and duress: held on appeal by the Judicial Committee that the *onus* of proving such fraud and duress lay upon the appellant, in proceeding upon his petition in the Court below, and their Lordships being satisfied that full opportunity for such proof had been afforded him, confirmed the judgment of the Sudder Court, but, under the circumstances, without costs. [*Motee Lal Opudhiya* v. *Juggurnath Gurg*] 1

ENGLISH LAW IN THE EAST INDIES.

See "ALIENS."

EVIDENCE.

1. Copies of documents, for the originals of which no proof was given of search, cannot be received as evidence. [*Meer Usd-oollah* v. *Mussumat Beeby Imaman*] - 19
2. *See* "ACCOUNT CURRENT."
3. "ACKNOWLEDGMENT."
4. "LIMITATION OF SUITS."
5. "POWER OF ATTORNEY."
6. "SUB-PARTNERSHIP."
7. "SUPREME COURT OF CALCUTTA."

EXECUTORS.

See "WILL."

FOREIGN CHARITIES.

See "CHARITABLE BEQUEST."

GOVERNOR-GENERAL IN COUNCIL.

See "ARREARS OF REVENUE."

HOONDIES.

See "BILL OF EXCHANGE."

INDIAN INSOLVENT ACT.

Palmer and Co. having borrowed a large sum of the Bank of *Bengal*, deposited Company's paper with the bank to a greater amount, as a collateral security, accompanied with a written agreement, authorizing the bank, in default of repayment of the loan by a given day, "to sell the Company's paper for the reimbursement of the bank, rendering to *Palmer* and Co. any surplus." Before default was made in the repayment of the loan, *Palmer* and Co. were declared insolvent, under the Indian Insolvent Act, 9 *Geo.* IV. *c.* 73, by the thirty-sixth section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other; and that all such debts as might be proved under a commission of bankruptcy in *England*, might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of *Palmer* and Co., which they had discounted for them before the transaction of the loan, and the agreement as to the deposit of the Company's paper. The time for repayment of the loan having expired, the bank sold the Company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of *Palmer* and Co., against the bank, to recover the amount of this surplus, held that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act. [*Young* v. *Bank of Bengal*] - - - - 87

JOINT LIABILITY.

See "UNDIVIDED HINDOO FAMILY."

KISTBUNDY.

A written instrument, or *kistbundy*, for securing the payment of the *kist* by monthly instalments, though usual and advisable, is not *necessary* to entitle the Government to enforce such payment, if the revenue be a fixed monthly *kist* or instalment. [*Kirt Chunder Roy* v. *the Government and others*] - - 383

LIMITATION OF SUITS.

1. A residence at Poonah beyond the limits of the jurisdiction of the Company's Courts is not such a good and sufficient cause for not commencing a suit for a period exceeding twelve years, as will entitle a plaintiff to recover under the Bombay Regulation I, A.D. 1800, sect. 13; and an offer of a specific sum by the defendant by way of compromise to a suit instituted after a lapse of twenty-seven years from the cause of action is not such an admission of the truth of the plaintiff's matter of demand as to take the case out of the prohibitory words of that clause. [*Bhaee-chund* v. *Purtab-chund*] - - - 154

2. The Bombay Regulation I, A.D. 1800, sect. 13, limiting the right of action to twelve years, include suits on account of land as well as personal actions. Where, therefore, a suit was instituted for the share of certain lands, some of which were attached to the hereditary office of *Desaye*, and no satisfactory proof was given that any demand had been made in respect thereof within that period, the right of action was held to be absolutely barred. [*Nundram Dyaram* v. *Dula-Bhaee Kurparam*] - - - - - - - 414

3. The Sudder Dewanny Court having, upon the examination of the evidence of pedigree, and the opinion of the law officers of the Court, reversed the decision of the Provincial Court, in a claim, which was otherwise barred by the Bengal Regulations of Limitation, the Judicial Committee dismissed an appeal from the decision of the Sudder Court under such circumstances with costs.

[*Gholam Russool* v. *Mussumat Mughlo*] - - - - - 446

See "ADVERSE POSSESSION," 2.

MUTUAL CREDITS.

See "INDIAN INSOLVENT ACT."

POTTAH.

The *pottah* granted by the collector is not a muniment of title, but only an evidence of holding, according to a local and fiscal regulation. [*Freeman* v. *Fairlie*] - - - - 305

POWER OF ATTORNEY.

The recital of a power of attorney in a Will, affecting to transmit the authority conferred by it, is not sufficient evidence of the contents of such an instrument in the absence of proof of its loss or destruction. [*Boman-jee Muncher-jee* v. *Syud Hoossain Abd-oollah*] - - 494

PRACTICE.

1. Leave given to restore an appeal dismissed for want of prosecution, the Court below having consolidated it with another appeal in the same cause, which was still pending. [*Surroopchunder Chowdry* v. *Ramrutton Mullick*] - - - 358

2. Two suits having been brought for sums due on the same account, each of which was under 50,000 rupees, or £5,000, held that such suits could not be consolidated for the purpose of appeal, though the original severance of them was contrary to the plaintiff's instructions, and the aggregate amount of both exceeded that amount. [*Moofti Mohummud Ubdoolah* v. *Baboo Mootechund*] - - - - - - 363

3. Where an instrument has been admitted to probate, and acted upon in the Courts below, this Court will not enter into the question whether the instrument is sufficiently proved or not. [*Khoorshed-jee Manik-jee* v. *Mehrwan-jee Khoorshed-jee*] 431

4. The Judicial Committee will not entertain an appeal merely for costs. [*Mussumat Keemee Baee* v. *Latchman-das Narain-das*] - - 470

See "CHARITABLE BEQUESTS."

See "SUB-PARTNERSHIP."

PRINCIPAL AND AGENT.

See "BILL OF EXCHANGE."

PROBATE.

See "WILL."

RAZENAMAH.

See "DURESS."

REGISTERS.

Though the registers made pursuant to the Bengal Regulations are not at all of the nature of conclusive evidence of title (the Regulations themselves providing against that), yet as the act of registration after a proclamation amounts to a public open, and notorious assertion of title on the one side, the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, afford equally strong presumption of the non-existence of any title on the other.

When, therefore, a party sought to obtain possession of certain property denominated a *muddud-mash*, against a defendant whose adverse possession had existed from 1761, upon the allegation that such adverse possession was in the character of agent to the plaintiff, the Judicial Committee held (affirming the judgment of the Court below) that the proof of such agency lay on the plaintiff; and the balance of evidence being in favour of the defendant's right to possession, the circumstance of his having registered himself as owner in 1797, without any opposition, or subsequent claim to register on the part of the plaintiff, and having continued in undisturbed possession from that period was conclusive against the claim set up by the plaintiff. [*Meer Usd-oolah* v. *Mussumat Beeby Imaman*] - - - - - 19

SALE.

See "ARREARS OF REVENUE."

SECURITY.

See "ARREARS OF REVENUE."

STATUTE OF FRAUDS.

See "DEVISE OF LANDS IN BENGAL."

STATUTE OF MORTMAIN.

The Statute of Mortmain does not extend to the British territories in the *East Indies*. [*The Mayor of Lyons* v. *the East India Company*] 175

TENURE OF LAND IN CALCUTTA.

The tenure of land in *Calcutta* is of the nature of freehold, and real estate will not therefore pass by an unattested Will. [*Freeman* v. *Fairlie*] 305

SUB-PARTNERSHIP.

On a question whether a sub-partnership had been entered into, the validity of which depended on an instrument produced in evidence in the Court below, and upon inspection, as well as the evidence in support of it, pronounced to be invalid, the Judicial Committee, in confirming the judgment of both Courts below, were of opinion that they were concluded under the circumstances of the case from entering upon the examination of the instrument itself, though they fully concurred in the opinion expressed by the Judge of the Zillah Court, and dismissed the appeal with costs. [*Nundram Dyaram and others* v. *Dula-bhaee Kurparam*] - - 414

SUPREME COURT OF CALCUTTA (Jurisdiction of).

Under the jurisdiction of the Supreme Court at *Calcutta*, a person, though resident at *Benares*, is liable to its jurisdiction, if privy to and co-operating in a misdemeanor committed within it.

Where, therefore, a party resident at *Benares* was indicted with others before the Supreme Court for a conspiracy, in procuring the prosecutor to be arrested in a fictitious action at law, and the instructions for the arrest were proved, to the satisfaction of the jury, to have originated with the appellant, it was held by the Judicial Committee that the offence being completed within the jurisdiction of the Supreme Court at *Calcutta*, that Court had rightly assumed jurisdiction over the parties privy to it; though, from the slight nature of the evidence, they directed a new trial. [*Jannokee Doss* v. *the King*] - - 67

TITLE.

Though the registers made pursuant to the Bengal Regulations are not at all of the nature of conclusive evidence of title (the Regulations themselves providing against that), yet as the act of registration after a proclamation amounts to a public, open, and notorious assertion of title on one side, the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, afford equally strong presumption of the non-existence of any title on the other. [*Meer Usd-oollah* v. *Mussumat Beeby Imaman*] - 19

A suit having been brought for the amount of one year's *moghulaee*, or government dues, and amended, by claiming, pursuant to Reg. IV. of 1827, ch. ii. sec. 3, ten years' dues, is a suit for the title to the dues as well as for the dues themselves. [*Boman-jee Muncher-jee* v. *Syud Hoossain Abd-oollah*] - - 494

See "POTTAH."

See "ADVERSE POSSESSION," 2.

UNDIVIDED HINDOO FAMILY.

Disputes having arisen among the brothers of an undivided Hindoo family, and owners of land, certain agreements were entered into between them, by which their mutual interests and liabilities were declared, and the matters in dispute referred to arbitration. A decree having been obtained by a creditor named in the agreements, against one member only of the family, and the debt recovered from him alone, it was decided by the Courts, and affirmed on appeal, that the other parties were liable to be called upon to contribute in respect of their several shares. [*Domun Sing* v. *Kasee Ram*] - - - - - 366

WILL (Constructive compliance with the Terms of).

The heirs of a Parsee merchant having, upon his death, taken possession of his shop and continued to carry on his business for nearly two years, the Courts below refused to disturb their possession upon the production of a Will, by which the business was directed to be carried on by the executor for their benefit, until he should think proper to admit them into possession: Held by the Judicial Committee of the Privy Council affirming the judgment of the Courts below, that the abstaining from producing the will for the above period, was a consent on the part of the appellant to the respondents' possession of their father's estate and business, and was therefore a virtual compliance with the terms of the Will.

Semble--Where an instrument has been admitted to probate, and acted upon in the Courts below, this Court will not enter into the question whether the instrument is sufficiently proved or not. [*Khoorsh jee Manik-jee* v. *Mehrwan-jee Khoorshed-jee and another*] - - - - - - 431

TMENT OF LAW
LIBRARY
OF KASHMIR
DATE

THE END.

PRINTED BY RICHARD KINDER, GREEN ARBOUR COURT, OLD BAILEY.